

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

PERSONAL AUDIO, LLC		DOCKET 9:09CV111
		JULY 7, 2011
VS.		8:31 A.M.
APPLE, INC., ET AL		BEAUMONT, TEXAS

VOLUME 10 OF __, PAGES 2919 THROUGH 3231

REPORTER'S TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE RON CLARK
UNITED STATES DISTRICT JUDGE, AND A JURY

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1 (REPORTER'S NOTES PERSONAL AUDIO V. APPLE,
2 JURY TRIAL, VOLUME 10, 8:31 A.M., THURSDAY, JULY 7, 2011,
3 BEAUMONT, TEXAS, HON. RON CLARK PRESIDING.)

4 (OPEN COURT, ALL PARTIES PRESENT, JURY
5 PRESENT.)

6 THE COURT: We found, ladies and gentlemen,
7 just at the last minute, two exhibit numbers that were
8 incorrect in the jury instructions. So, what we're going
9 to do is correct those with a pen correction on the
10 copies we're going to be reading and hand them out to you
11 in just a second.

12 Just so you don't think we were goofing off on
13 that, we were here until about 9:00 last night getting
14 this all ready and thought we had it completely
15 proofread.

16 All right. Ladies and gentlemen, you've heard
17 the evidence in the case; and I'll now instruct you on
18 the law. I've provided you with a copy; so, you can
19 follow along with me or you can just listen. I've found
20 that different people listen in different ways, like you
21 sometimes see in church. Some people follow the
22 readings, and some people just listen. You've got your
23 choice.

24 It is your duty to follow the law as I give it
25 to you. On the other hand, you, the jury, are the judges

1 of the facts. Do not consider any statement that I have
2 made during the course of the trial, or make in these
3 instructions, as an indication that I have any opinion
4 about the facts of this case.

5 After I instruct you on the law, the attorneys
6 will have an opportunity to make their closing arguments.
7 Statements and arguments of the attorneys are not
8 evidence and are not instructions on the law. They are
9 intended only to assist the jury in understanding the
10 evidence and the parties' contentions.

11 Now, it is my duty as judge to explain what
12 some of the words used in the patent claims mean.
13 Attached as Appendix A to this charge -- which you'll get
14 when you go back to the jury room. It's the same one
15 that was in your juror notebook -- are the claims I have
16 defined for you. These are the same definitions found in
17 the "definitions" section of your juror notebooks. You
18 must accept as correct the definitions contained in
19 Appendix A.

20 Attached as Appendix B to this charge is the
21 definition of a "person of ordinary skill in the art."
22 This is the same definition that is found in the
23 "glossary" section of your juror notebooks. The words
24 and terms of the patents that I have not defined for you
25 in Appendix A are to be given their ordinary and

1 accustomed meaning as understood by a person of ordinary
2 skill in the art in the context of the patent
3 specifications and file history.

4 Now, when words in these instructions and in
5 the definitions in Appendix A are used in a sense that
6 varies from their commonly understood meaning, you are
7 given a proper legal definition which you are bound to
8 accept in place of any other meaning. The other words in
9 these instructions and in the definitions I have provided
10 to you have the meaning commonly understood.

11 Answer each question based on the facts as you
12 find them. Do not decide who you think should win and
13 then answer the questions accordingly. Your answers and
14 your verdict must be unanimous.

15 Now, you will be instructed to answer some
16 questions based upon a preponderance of the evidence.
17 This means you must be persuaded by the evidence that
18 what the party seeks to prove is more likely true than
19 not true. You will be instructed to answer other
20 questions by clear and convincing evidence. This is a
21 higher burden than by a preponderance of the evidence,
22 but it does not require proof beyond a reasonable doubt.
23 Clear and convincing evidence is evidence that shows what
24 the party seeks to prove is highly probable.

25 In deciding whether any fact has been proved

1 in the case, you may, unless otherwise instructed,
2 consider the testimony of all witnesses, regardless of
3 who may have called them, and all exhibits received in
4 evidence, regardless of who may have produced them, and
5 the facts to which the parties have stipulated.

6 Attached as Appendix C to this charge is a
7 list of facts to which the parties have stipulated. You
8 must treat all of the stipulated facts as having been
9 proved.

10 Now, in determining the weight to give to the
11 testimony of a witness, you should ask yourself whether
12 there was evidence tending to prove that the witness
13 testified falsely concerning some important fact or
14 whether there was evidence that at some other time the
15 witness said or did something, or failed to say or do
16 something, that was different from the testimony the
17 witness gave before you during the trial.

18 You should keep in mind, however, that a
19 simple mistake by a witness does not necessarily mean
20 that the witness was not telling the truth as he or she
21 remembers it, because people may forget some things or
22 remember other things inaccurately. So, if a witness has
23 made a misstatement, you need to consider whether that
24 misstatement was an intentional falsehood or simply an
25 innocent lapse of memory; and the significance of that

1 may depend on whether it has to do with an important fact
2 or only with an unimportant detail.

3 Now, if scientific, technical, or other
4 specialized knowledge may be helpful to the jury, a
5 witness with special training or experience, sometimes
6 called an "expert," may testify and state an opinion
7 concerning such matters. However, you are not required
8 to accept that opinion. You should judge such testimony
9 like any other testimony. You may accept it or reject it
10 and give it as much weight as you think it deserves,
11 considering the witness' education and experience, the
12 soundness of the reasons given for the opinion, and all
13 the other evidence in the case. In deciding whether to
14 accept or rely upon the opinion of such a witness, you
15 may consider any bias of the witness, including any bias
16 you may infer from evidence that the witness has been or
17 will be paid for reviewing the case and testifying, or
18 from evidence that he or she testifies regularly.

19 In making up your mind and reaching your
20 verdict, do not make your decisions simply because there
21 were more witnesses on one side than the other. Do not
22 reach a conclusion on a particular point just because
23 there were more witnesses testifying for one side on that
24 point. The testimony of a single witness may be
25 sufficient to prove any fact, even if a greater number of

1 witnesses may have testified to the contrary, if after
2 considering all the other evidence, you believe that
3 single witness.

4 While you should consider only the evidence in
5 this case, you are permitted to draw such reasonable
6 inferences from the testimony and exhibits as you feel
7 are justified in light of common experience. In other
8 words, you may make deductions and reach conclusions that
9 reason and common sense lead you to draw from the facts
10 that have been established by the testimony and evidence
11 in the case.

12 There are two types of evidence that you may
13 consider in properly finding the truth as to the facts in
14 the case. One is direct evidence, such as testimony of
15 an eyewitness. The other is indirect or circumstantial
16 evidence, the proof of a chain of circumstances that
17 indicates the existence or nonexistence of certain other
18 facts. As a general rule, the law makes no distinction
19 between direct and circumstantial evidence but simply
20 requires that you find the facts from all the evidence,
21 both direct and circumstantial.

22 Now, during the trial, I sustained objections
23 to certain questions. You must disregard those questions
24 entirely. Do not speculate as to what the witness would
25 have said if he or she would have been permitted to

1 answer the question. I also sustained objections to
2 certain exhibits. You must disregard these exhibits
3 entirely. Do not speculate as to what facts or
4 information may have been supported by the exhibit if it
5 had been admitted into evidence.

6 Certain exhibits were admitted for a limited
7 purpose. You should not consider these exhibits for any
8 purpose other than that for which they were admitted.

9 Now, these exhibits are: Plaintiff's Exhibits
10 771A through Plaintiff's Exhibit 781A and Plaintiff's
11 Exhibit 748A, admitted only for the purpose of
12 summarizing or listing many of the exhibits upon which
13 Dr. Almeroth relied for his testimony. These summary
14 exhibits are not themselves evidence and are intended
15 only to provide you with a guide to Dr. Almeroth's
16 testimony and point you to the relevant underlying
17 exhibits that have been admitted.

18 Plaintiff's Exhibit 10 through Plaintiff's
19 Exhibit 13, admitted for the purpose of background
20 information, but they are not admitted as comparable
21 license agreements.

22 Then we have DDX 608, 610, 611, DDX 616
23 through DDX 626, DDX 629 through DDX 634, DDX 636, 638
24 through 641, DDX 643, DDX 647 through DDX 655, DDX 657,
25 DDX 658, DDX 660 through DDX 663, and DDX 669 through

1 DDX 705. These were admitted only for the purpose of
2 summarizing or listing many of the exhibits upon which
3 Dr. Wicker relied for his testimony. These summary
4 exhibits are not themselves evidence and are intended
5 only to provide you with a guide to Dr. Wicker's
6 testimony and point you to the relevant underlying
7 exhibits that have been admitted.

8 And then, finally, DDX 827. This was admitted
9 only for the purpose of summarizing or listing many of
10 the exhibits upon which Dr. Ugone relied for his
11 testimony. DDX 827 is not in itself evidence and is
12 intended only to provide you with a guide to Dr. Ugone's
13 testimony and point you to the relevant underlying
14 exhibits that have been admitted.

15 On each of those limitations when I'm talking
16 about the underlying exhibits, those are in evidence.
17 You'll have them back there with an exhibit list. You
18 can look up those numbers, and you can look at the
19 exact -- the actual exhibit. And it's the actual exhibit
20 that's numbered and in evidence that you are to rely on.
21 Those summaries are there just to help provide you with a
22 guideline of who said what.

23 Also, do not assume from anything that I may
24 have done or said during the trial that I have any
25 opinion concerning any of the issues in this case.

1 Except for the instructions to you on the law, you should
2 disregard anything I may have said during the trial in
3 arriving at your own findings as to the facts.

4 If you've taken notes, they are to be used
5 only as aids to your memory; and if your memory should be
6 different from your notes, you should rely on your
7 memory, not on your notes. If you did not take notes,
8 rely on your own independent memory of the testimony. Do
9 not be unduly influenced by the notes of other jurors. A
10 juror's notes are not entitled to any greater weight than
11 the recollection of each juror concerning the testimony.

12 Now, the patents involved in this case are
13 referred to as the "'076 and the '178 patents." The
14 plaintiff, Personal Audio, LLC, ("Personal Audio")
15 contends that the defendant, Apple, Inc., ("Apple")
16 infringes claims 1, 3, and 15 of the '076 patent and
17 claims 1, 6, 13, and 14 of the '178 patent. Each of the
18 asserted patent claims is to be considered separately as
19 a separate invention. Personal Audio contends that the
20 following Apple products infringe the asserted claims of
21 the patents-in-suit:

22 Group 1, iPod classic Generation 3. There's
23 1,627,691 units sold.

24 And these listings of the numbers sold will
25 become relevant to you when you get the verdict form

1 because you'll be asked to, if you get that far, if you
2 get that far, to make some damage calculations based on
3 these numbers.

4 Group 2, iPod mini Generations 1 and 2 and
5 iPod classic Generation 4. 11,433,022 units sold.

6 Group 2, iPod classic Generation 5.
7 15,219,066 units sold.

8 Group 4, iPod nano Generation -- 10,673,749
9 units sold.

10 Group 5, iPod nano Generation 2. 13,379,878
11 units sold.

12 Group 6, the iPod nano Generation 3 and iPod
13 classic Generation 6. 21,872,953 units sold.

14 Group 7, the iPod nano Generation 4.
15 10,946,988 units sold.

16 And Group 8, iPod nano Generation 5.
17 8,642,082 units sold.

18 Now, Apple denies that it is infringing the
19 patents-in-suit. Apple also contends that the
20 patents-in-suit are invalid because the inventions in the
21 patents are described in one or more prior art
22 references.

23 You have the responsibility of deciding
24 whether Apple has infringed the asserted claims of the
25 patents-in-suit; and even though the PTO examiner has

1 allowed the claims of the patents, you, as the jury, also
2 have the responsibility for deciding whether the claims
3 of the patents are invalid [*sic*].

4 Now, to decide the questions of infringement
5 and invalidity, you must first understand what the claims
6 of the patent cover; that is, what they prevent anyone
7 else from doing. This is called "claim interpretation."
8 You must use the same claim interpretation for both your
9 decisions on infringement and your decisions on
10 invalidity. I instructed you earlier on the definitions
11 you must use in interpreting claims.

12 Now, the patent claims are the numbered
13 sentences at the end of the patents-in-suit. Each claim
14 describes a separate invention. The claims are word
15 pictures intended to define, in words, the boundaries of
16 the inventions. Only the claims of a patent can be
17 infringed. Neither the written description, sometimes
18 called the "specification," nor the drawings of a patent
19 can be infringed. Each of the claims must be considered
20 individually.

21 The claims are divided into parts called
22 "limitations." These limitations are also referred to as
23 "elements." You shall give your decisions on
24 infringement based only on the asserted claims; namely,
25 claims 1, 3, and 15 of the '076 patent and claims 1, 6,

1 13, and 14 of the '178 patent.

2 Patent claims exist in two forms, referred to
3 as "independent claims" and "dependent claims." An
4 independent claim does not refer to any other claim of
5 the patent. Thus, it is not necessary to look at any
6 other claim to determine what an independent claim
7 covers. Claim 1 of the '076 patent and claims 1 and 14
8 of the '178 patent are independent claims.

9 Now, a dependent claim refers to at least one
10 other claim in the patent. A dependent claim includes
11 each of the limitations of the other claim or claims to
12 which it refers as well as the additional limitations
13 recited in the dependent claim itself. Therefore, to
14 determine what is covered by a dependent claim, it is
15 necessary to look both at the dependent claim itself and
16 the claim or claims to which it refers. Claims 3 and 15
17 of the '076 patent and claims 6 and 13 of the '078 *[sic]*
18 patent are dependent claims.

19 So, claim 3 of the '076 patent depends from
20 claim 2, which depends from claim 1.

21 Claim 15 of the '076 patent depends from
22 claim 14.

23 Claim 6 of the '178 patent depends from
24 claim 5, which depends from claim 4, which depends from
25 claim 3, which depends from claim 2, which depends from

1 claim 1.

2 And claim 13 of the '178 patent depends from
3 claim 9, which depends from claim 1.

4 Now, the patent laws give the owner of a valid
5 patent the right to exclude others from making, using,
6 selling, or offering to sell the patented invention
7 within the United States during the term of the patent.
8 Any person or business entity that engages in any of
9 those acts without the patent owner's permission
10 infringes the patent.

11 Knowledge of the patent or intent to infringe
12 is immaterial. Someone can infringe a patent without
13 knowing that what they are doing is an infringement of
14 the patent. Someone may also infringe a patent even
15 though they believe in good faith that what they are
16 doing is not an infringement of any patent. Someone can
17 also infringe a patent even if they have one or more of
18 their own patents covering parts or components of the
19 accused product. On the other hand, someone does not
20 infringe by inventing a new and different way of
21 accomplishing the same result; that is, to create a
22 product that does not incorporate all of the limitations
23 of any claim of the patents-in-suit.

24 Now, only the claims of a patent can be
25 infringed. You must compare the elements of the asserted

1 claims to each accused product or product group to
2 determine whether or not there is infringement. You
3 should not compare the accused products with any specific
4 example set out in the patents' specification. The only
5 correct comparison is with the language of the asserted
6 claims themselves, with the meanings that I have given
7 you.

8 You must determine separately for each of the
9 asserted claims and separately for each accused product
10 group whether or not there is infringement. Now, as I
11 have explained to you, a dependent claim includes all of
12 the requirements of the claim or claims to which it
13 refers plus additional requirements of its own.
14 Therefore, to find a dependent claim is infringed, you
15 must first find that any claim from which it depends is
16 infringed. For example, to find that dependent claim 3
17 of the '076 patent is infringed, you must first find that
18 independent claim 1 and dependent claim 2 of the
19 '076 patent are infringed. If you find that an
20 independent claim is infringed, you must then decide
21 separately whether the additional requirements of any
22 claims that depend from it have also been infringed.

23 There are two ways in which a patent claim can
24 be infringed: One, literal infringement and, two,
25 infringement under the doctrine of equivalents. I'll

1 first explain to you the circumstances under which you
2 may find literal infringement or infringement under the
3 doctrine of equivalents. Then I'll explain to you a
4 particular kind of claim limitation called a
5 "means-plus-function" limitation and the circumstances
6 under which you may find infringement of a claim that
7 contains a means-plus-function limitation.

8 Now, to show literal infringement of a claim,
9 Personal Audio must prove by a preponderance of the
10 evidence that during the time the patent is in force,
11 Apple has made, used, sold, or offered to sell within the
12 United States a product that incorporates all of the
13 limitations of that claim and has done so without
14 Personal Audio's permission. Personal Audio contends
15 that claims 1, 3, and 15 of the '076 patent are literally
16 infringed. You must compare each of the accused products
17 separately with each and every one of the limitations of
18 each asserted claim to determine whether Personal Audio
19 has shown, by a preponderance of the evidence, that each
20 limitation of a claim is found in that product.

21 A claim limitation is present in an accused
22 product if it exists in the product just as it is
23 described in the claim language, either as I have defined
24 that language for you or, if I did not define it, as that
25 language is commonly understood.

1 In general, a product does not infringe if it
2 must be altered in order to satisfy all the limitations
3 of a claim. However, if a product is sold or packaged
4 with components that are intended to be attached or
5 connected before operation and the seller provides
6 instructions for such attachment or connection, the
7 product may infringe if, when the components are attached
8 or connected as instructed, the product includes all the
9 limitations of the claim.

10 A claim limitation that describes the
11 capability for doing something is present in an accused
12 product if the accused product includes components or
13 structures capable of operating as described in the
14 claim, even if a user never actually operates the product
15 in the manner described.

16 If an accused product omits even a single
17 element recited in a claim, then you must find that with
18 respect to that product, Apple has not literally
19 infringed that claim.

20 If during the time a patent is in force
21 someone made, used, sold, offered to sell, or imported
22 within the United States a product that does not
23 incorporate all of the limitations of an asserted claim,
24 there can still be infringement if the product satisfies
25 that claim under the doctrine of equivalents.

1 Under the doctrine of equivalents, a product
2 satisfies a claim if, for each and every limitation of
3 the claim that is not literally present in the accused
4 product, the accused product includes some corresponding
5 alternative that is equivalent to the unmet claim
6 requirement.

7 Personal Audio contends that the "downloading
8 from one or more server computers" limitations of the
9 '178 patent, which are limitations number 1A in claim 1
10 and 14E in claim 14 in your juror notebooks, are not
11 literally present in the accused product but that the
12 accused products include an equivalent alternative.
13 Personal Audio, therefore, contends that claim 1 and the
14 asserted claims that depend from it, claims 6 and 13, as
15 well as claim 14 of the '178 patent are infringed under
16 the doctrine of equivalents. As with literal
17 infringement, Personal Audio must prove infringement
18 under the doctrine of equivalents by a preponderance of
19 the evidence.

20 In making your decision as to whether or not
21 an accused product is equivalent under the doctrine of
22 equivalents, you must look at each and every limitation
23 of a claim and decide whether or not the accused product
24 includes that limitation or includes an alternative that
25 is equivalent to the unmet limitation. If it does, the

1 product satisfies the claim under the doctrine of
2 equivalents. If instead, one, the product includes an
3 alternative to the unmet limitation but the alternative
4 is not equivalent to the unmet limitation or, two, the
5 product includes no corresponding alternative to the
6 unmet limitation, you must find that the limitation is
7 not satisfied under the doctrine of equivalents and there
8 is no infringement under the doctrine of equivalents.

9 Under the doctrine of equivalents, an
10 alternative is considered to be equivalent to an unmet
11 claim limitation if a person having ordinary skill in the
12 art, as I have defined that person for you, would have
13 considered the differences between the unmet limitation
14 and the alternative to be insubstantial at the time of
15 the alleged infringement.

16 In deciding whether an alternative in an
17 accused product is insubstantially different from an
18 unmet claim limitation, you may consider whether the
19 alternative and the unmet limitation, one, perform
20 substantially the same function and, two, work in
21 substantially the same way, three, to achieve
22 substantially the same result.

23 You may also consider whether, at the time of
24 the alleged infringement, a person having ordinary skill
25 in the art would have known of the interchangeability of

1 the alternative and the unmet claim limitation.
2 Interchangeability at the present time is not sufficient.
3 Rather, in order for the alternative to be considered
4 interchangeable with the unmet limitation, the
5 interchangeability must have been known to persons of
6 ordinary skill in the art at the time of the infringement
7 and be only insubstantially different.

8 The doctrine of equivalents must be applied to
9 the individual limitations of a claim, not to the
10 invention as a whole, because each limitation in a patent
11 claim is deemed material in defining the scope and limits
12 of the patented invention. The public is entitled to
13 rely on the limitations of the claims in order to avoid
14 infringement. Therefore, the doctrine of equivalents
15 cannot be used to eliminate a claim limitation or render
16 any claim limitation unnecessary.

17 Means-plus-function limitations. The claims
18 of the patents-in-suit contain what are called
19 "means-plus-function" limitations. For each
20 means-plus-function limitation in issue, I have defined
21 for you the function to be performed. Now, these are set
22 out in Appendix A. For each means-plus-function
23 limitation in issue, I have also defined for you the
24 corresponding means or structures that were described in
25 the patents' specification for performing the claimed

1 functions. You will also find these in Appendix A. You
2 must use my definitions of the means-plus-function
3 limitations in your deliberations regarding infringement
4 and validity.

5 To show that an accused product meets the
6 requirements of a means-plus-function limitation,
7 Personal Audio must show by a preponderance of the
8 evidence that, one, the accused product includes a
9 structure that performs the claimed function and, two,
10 that structure is either identical to or equivalent to a
11 structure I have defined for you. You must consider each
12 product separately.

13 In deciding whether Personal Audio has shown
14 that a particular Apple product includes a structure
15 covered by a means-plus-function limitation, you must
16 first decide whether that product has a structure that
17 performs the function that I have defined for that
18 means-plus-function clause. If not, the claim containing
19 that means-plus-function limitation is not infringed.

20 If you find that the accused product in
21 question does have a structure that performs the claimed
22 function, you must next identify that structure and you
23 must then determine whether Personal Audio has shown that
24 the structure in the accused product is either identical
25 to or equivalent to a structure that I have listed in

1 Appendix A for performing the claimed function. If the
2 structure is identical or equivalent, the
3 means-plus-function limitation is satisfied by that
4 structure of Apple's product. If all the other
5 means-plus-function limitations in the claim are also
6 present in that particular product and all of the other
7 claim limitations that are not in means-plus-function
8 form are present in the product, either literally or
9 under the doctrine of equivalents, then that product
10 infringes the claim.

11 Now, a structure is considered to be
12 equivalent to a structure I have defined for you if a
13 person having ordinary skill in the art, as I have
14 defined that person for you, would have considered the
15 differences between the structure I have defined for you
16 and the substitute structure to be insubstantial at the
17 time the patent issued. The substitute structure must
18 have been available technology at the time the patent
19 issued.

20 To be a structural equivalent, the substitute
21 structure must perform the identical function recited in
22 the claim as I have defined that function for you. In
23 deciding whether a substitute structure in an accused
24 product is insubstantially different from a structure
25 that I have defined for you, you may consider whether the

1 two structures, one, work in substantially the same way,
2 two, to achieve substantially the same result. The fact
3 that a structure may perform a function in addition to
4 the claimed function is irrelevant.

5 You may also consider whether, at the time the
6 patent issued, a person having ordinary skill in the art
7 would have known of the interchangeability of the two
8 structures for performing the claimed function.
9 Interchangeability at the present time is not sufficient.
10 Rather, in order for a substitute structure to be
11 considered interchangeable with a structure that I have
12 defined for you, the interchangeability must have been
13 known to persons of ordinary skill in the art at the time
14 the patent issued. Further, while interchangeability is
15 an important factor, it is not dispositive since, by
16 definition, two structures that perform the same function
17 may be substituted for one another.

18 You may also consider whether the substitute
19 structure is claimed in a separate patent. The grant of
20 a United States patent is relevant to the issue of
21 whether the differences between a structure that I have
22 defined for you and the substitute structure are
23 insubstantial. However, the fact that a substitute
24 structure is separately patented does not automatically
25 negate infringement and creates no evidentiary

1 presumption of noninfringement. You should consider and
2 weigh the fact that a substitute structure is separately
3 patented together with all the other evidence of the
4 differences or similarities between a structure I have
5 defined for you and the substitute structure.

6 The individual components, if any, of an
7 overall structure that I have defined for you as
8 corresponding to a claimed function are not claim
9 limitations. You should not deconstruct a structure that
10 I have defined for you into component parts in order to
11 analyze equivalents. A substitute structure with a
12 different number of component parts may still be a
13 structural equivalent if it complies with the
14 requirements I have just described.

15 Now, only a valid patent may be infringed. To
16 be valid, the inventions claimed in a patent must be new
17 and nonobvious. A patent cannot take away from people
18 their right to use what was known or what would have been
19 obvious when the invention was made.

20 Now, even though the PTO has allowed the
21 claims of the patents-in-suit, you, the jury, have the
22 responsibility for deciding whether each claim in
23 question is valid. Apple must prove invalidity by clear
24 and convincing evidence. I will now explain to you the
25 grounds for invalidity in detail. In making your

1 determinations as to invalidity, you should consider each
2 claim separately.

3 For a patent to be valid, the invention
4 described in the patent must be new and nonobvious in
5 light of what came before. That which came before is
6 referred to as the "prior art." Apple contends that the
7 patents-in-suit are invalid because the inventions in the
8 suit *[sic]* are described in one or more prior art
9 references. There are two ways in which a patent claim
10 can be invalid because of prior art references, one,
11 anticipation and, two, obviousness. I'll describe these
12 for you below. But before I discuss anticipation and
13 obviousness, I'll first instruct you on the prior art.

14 Apple is relying on the following items of
15 prior art:

16 One, DAD system, DX 87.

17 Two, DAD manual, DX 1.

18 Three, Sound Blaster 16 user's guide, DX 3.

19 Microsoft *Windows 95* Resource Kit, DX 9.

20 Sony Discman player, DX 32.

21 Sony Discman operating instructions, DX 33.

22 The Loeb article, DX 8.

23 And the Musicshop reference manual, DX 27.

24 Now, you have heard that the PT0 did not have
25 the opportunity to evaluate some of the items of prior

1 art. You may, but are not required to, give more weight
2 to an item of prior art if that item was not considered
3 by the patent examiner before granting the patent.

4 I will now explain anticipation and
5 obviousness, the two ways in which a patent claim may be
6 invalid in light of the prior art.

7 Anticipation. A patent claim is invalid if
8 the claimed invention is not new. For a claim to be
9 invalid because it is not new, all of the claim's
10 limitations must have existed in a single item of prior
11 art. If a patent claim is not new, we say it is
12 "anticipated" by a prior art reference. Apple must prove
13 anticipation by clear and convincing evidence.

14 Now, Apple asserts that claims 1, 3, and 15 of
15 the '076 patent and claims 1, 6, 13, and 14 of the
16 '178 patent are anticipated by the DAD system and that
17 claims 1, 3, and 15 of the '076 patent and claims 1, 6,
18 13, and 14 of the '178 patent are anticipated by the
19 DAD manual.

20 A patent claim is anticipated by an item of
21 prior art if each and every limitation of the claim is
22 present in that item of prior art, arranged or combined
23 in the same way as recited in the claim.

24 Now, in deciding whether or not a single item
25 of prior art anticipates a patent claim, you should

1 consider that which is expressly stated or present in the
2 item of prior art and also that which is inherently
3 present. Something is inherent in an item of prior art
4 if it is always present in the prior art or always
5 results from the practice of the prior art and a person
6 of ordinary skill in the art would understand that to be
7 the case.

8 A patent claim is anticipated if each claim
9 element is disclosed, either expressly or inherently, in
10 a single prior art reference and the claimed arrangement
11 or combination of those items is also disclosed, either
12 expressly or inherently, in that same prior art
13 reference. You may not find that the prior art
14 anticipates a patent claim by combining two or more items
15 of prior art.

16 A patent claim is invalid if it would have
17 been obvious to a person of ordinary skill at the time
18 the invention was made. Unlike anticipation, obviousness
19 may be shown by considering multiple items of prior art
20 in combination with each other. Apple must prove
21 obviousness by clear and convincing evidence.

22 Apple contends that, to a person of ordinary
23 skill in the art at the time the invention was made:

24 Claims 1, 3, and 15 of the '076 patent and
25 claims 6 and 14 of the '178 patent are obvious in light

1 of the DAD system or DAD manual in combination with
2 either of the two Sony Discman references.

3 Claims 1, 3, and 15 of the '076 patent and
4 claims 6 and 14 of the '178 patent are obvious in light
5 of the DAD system or DAD manual in combination with the
6 Musicshop reference manual.

7 Three, claim 13 of the '178 patent is obvious
8 in light of the DAD system or DAD manual in combination
9 with the Loeb article.

10 Four, claims 1, 3, and 15 of the '076 patent
11 and claims 1, 6, 13, and 14 are obvious in light of the
12 Sound Blaster 16 user's guide in combination with the
13 Microsoft *Windows 95* Resource Kit.

14 Claims 1, 3, and 15 of the '076 patent and
15 claims 6 and 14 of the '178 patent are obvious in light
16 of the Sound Blaster 16 user's guide in combination with
17 the Microsoft *Windows 95* Resource Kit and either of the
18 two Sony Discman references.

19 Claims 1, 3, and 15 of the '076 patent and
20 claims 6 and 14 of the '178 patent are obvious in light
21 of the Sound Blaster 16 user's guide in combination with
22 the Microsoft *Windows 95* Resource Kit and the Musicshop
23 reference manual.

24 And, seven, claim 13 of the '178 patent is
25 obvious in light of the Sound Blaster 16 user's guide in

1 combination with the Microsoft *Windows 95* Resource Kit
2 and the Loeb article.

3 The question is: Would it have been obvious
4 to a person of ordinary skill in the art, who knew of
5 these particular items of prior art listed for a
6 particular claim, to make the invention described in the
7 claim at issue? If the answer to that question is "yes,"
8 then that patent claim is invalid.

9 Obviousness is determined from the perspective
10 of a person of ordinary skill in the art. The issue is
11 not whether the claimed invention would have been obvious
12 to you or to me as a judge or to a genius in the field of
13 the invention. Rather, the question is whether or not
14 the invention would have been obvious to a person of
15 ordinary skill in the field of the invention.

16 You should not use hindsight when comparing
17 the claimed invention to the prior art for obviousness;
18 That is, when making a determination of obviousness or
19 nonobviousness, you must consider only what was known to
20 a person of ordinary skill in the art at the time the
21 invention was made. You must not judge the invention in
22 light of what is known today.

23 In determining whether or not the asserted
24 claims of the patents-in-suit would have been obvious,
25 you should make the following determinations from the

1 perspective of a person of ordinary skill in the art as I
2 have previously defined that person for you. First, what
3 is the scope and content of the prior art? Second, what
4 are the differences, if any, between the claimed
5 invention and the prior art? Third, what was the level
6 of ordinary skill in the art at the time the invention
7 was made? And, fourth, what evidence is there, if any,
8 of certain additional considerations relating to the
9 obviousness or nonobviousness of the invention?

10 You must decide, in view of the evidence
11 presented to you on each of these factors, whether the
12 claimed inventions would have been obvious. You must
13 make this determination separately for each asserted
14 claim in light of each combination listed above. I will
15 now give you more detailed instructions on each of the
16 factors you must consider.

17 Determining the scope and content of the prior
18 art means that you should determine what is disclosed in
19 each combination of art relied upon by Apple. You should
20 evaluate only those references that are listed in the
21 combinations above.

22 When evaluating what is disclosed in the prior
23 art combinations relied upon by Apple, you must decide
24 whether the prior art references were reasonably relevant
25 to the particular problem that the inventor faced in

1 making the invention covered by the patent claim at
2 issue. Relevant prior art includes prior art from the
3 field of the invention and also prior art from other
4 fields that a person of ordinary skill would look to when
5 attempting to solve the problem.

6 During the trial, Apple may have introduced
7 evidence of other items of art that are not listed in the
8 above combinations. Those other items are not prior art
9 as that term is defined in these instructions, and you
10 should not consider those other items when determining
11 the scope and content of the prior art.

12 In determining whether there are any
13 differences between the inventions covered by the patent
14 claims and the prior art, you should not look at the
15 individual differences in isolation. You must consider
16 each claimed invention as a whole and determine whether
17 or not it would have been obvious in light of the prior
18 art.

19 If you conclude that the prior art discloses
20 all the elements or steps of the claimed invention but
21 those elements or steps are found in separate items of
22 prior art, you may consider whether or not it would have
23 been obvious to combine those terms *[sic]*. A claim is
24 not obvious merely because all the limitations of that
25 claim already existed in the prior art.

1 In deciding whether it would have been obvious
2 to combine what is described in various items of prior
3 art, you should consider whether or not there was some
4 motivation or suggestion for a person of ordinary skill
5 to make the combination covered by the claimed invention.
6 To determine whether there was an apparent reason to
7 combine the known elements or steps in the way a patent
8 claims, you can look to interrelated teachings of
9 multiple prior art references, to the effects of demands
10 known to the community or present in the marketplace, and
11 to the background knowledge possessed by a person of
12 ordinary skill in the art. You should also consider
13 whether a person of ordinary skill in the art would have
14 been discouraged from following the path taken by the
15 inventor or whether a certain combination would have been
16 obvious to try.

17 Obviousness is determined from the perspective
18 of a person of ordinary skill in the art as I have
19 defined that person for you. This person is presumed to
20 know all of the prior art, not just what the inventor may
21 have known. When faced with a problem, the person of
22 ordinary skill in the art is able to apply his or her
23 experience and ability to the problem and also to look to
24 any available prior art to help solve the problem. When
25 evaluating the level of ordinary skill in the art, you

1 may consider material that is not technically prior art
2 as that term is defined in these instructions; that is,
3 in addition to the items that are listed in the
4 combinations above, you may also consider the other items
5 introduced during the trial that are contemporaneous with
6 the date of invention of the claim at issue because these
7 other items may reflect the knowledge of a person of
8 ordinary skill in the art at the time.

9 You may also consider what are referred to as
10 "additional considerations" or "secondary
11 considerations." Some of these considerations are:

12 Whether there was a long-felt but unmet need
13 in the art that was satisfied by the invention.

14 Two, whether others tried but failed to
15 achieve the results of the invention.

16 Three, whether the products covered by the
17 patent claims achieved commercial success.

18 Four, whether others in the field praised the
19 invention.

20 Five, whether those skilled in the art
21 expressed surprise or disbelief regarding the invention.

22 Six, whether the invention achieved any
23 unexpected results.

24 Seven, whether the inventors or the invention
25 proceeded in a direction contrary to accepted wisdom in

1 the field.

2 Eight, whether others copied or used the
3 invention.

4 And, nine, whether others have taken licenses
5 to use the invention.

6 Now, these considerations are only relevant to
7 obviousness if there is a connection or nexus between
8 them and the invention covered by the patent claims. For
9 example, commercial success is relevant to obviousness
10 only if the success of the product is related to a
11 feature of the patent claims. If the commercial success
12 is the result of something else, such as innovative
13 marketing, and not the result of a patented feature, then
14 you should not consider it to be an indication of
15 nonobviousness.

16 In conclusion, you must compare separately
17 each of the asserted claims of the patents-in-suit with
18 each combination of prior art references listed above in
19 light of the factors I have described for you to
20 determine whether Apple has proved by clear and
21 convincing evidence that one or more of the asserted
22 claims would have been obvious to a person of ordinary
23 skill in the art at the time the invention was made.

24 If you find by a preponderance of the evidence
25 that a claim has been infringed and you do not find by

1 clear and convincing evidence that the same claim is
2 invalid, then Personal Audio is entitled to an award of
3 damages adequate to compensate for the infringement, but
4 in no event less than a reasonable royalty for the use
5 made of the invention by Apple. I will give you more
6 detailed instructions on the calculation of a reasonable
7 royalty shortly. You may not add anything to the amount
8 of damages to punish Apple or to set an example.

9 You should not interpret the fact that I have
10 given instructions about damages as an indication in any
11 way that I believe that Personal Audio should or should
12 not win this case. It is your task to first decide
13 whether Apple is liable. I'm instructing you on damages
14 only so that you will have guidance in the event you
15 decide Apple is liable and that Personal Audio is
16 entitled to recover money from Apple.

17 Personal Audio has the burden to establish the
18 amount of its damages by a preponderance of the evidence.
19 Damages are limited to acts of infringement in the United
20 States. You should award only those damages that
21 Personal Audio establishes that it has more likely than
22 not suffered. Personal Audio is not entitled to damages
23 that are remote or speculative or based on guesswork.
24 While Personal Audio is not required to prove its damages
25 with mathematical precision, it must prove them with

1 reasonable certainty.

2 If you find that Personal Audio has
3 established infringement, it is entitled to at least a
4 reasonable royalty to compensate for that infringement.
5 A royalty is the amount of money a licensee pays to a
6 patent owner in exchange for the right to make, use, or
7 sell the claimed inventions under the patent. A
8 reasonable royalty is the amount of money a patent owner
9 who was willing to grant a license to the patented
10 inventions and a prospective licensee who was willing to
11 pay for that license would have agreed upon at the time
12 the infringement first began. It is the royalty that
13 would have resulted from an arm's-length negotiation
14 between a willing patent owner and a willing licensee,
15 assuming that both parties believed the claims in
16 question to be valid and infringed.

17 You must make two determinations regarding a
18 reasonable royalty: One, the form of the royalty and,
19 two, the amount of the royalty.

20 One form of royalty is called a "running
21 royalty." A running royalty is an ongoing royalty
22 payment made by the licensee based on the licensee's
23 sales or usage of the patented technology. For instance,
24 a licensee may pay the patent holder a certain dollar
25 amount for each product that it sells that incorporates

1 the patented technology. Another form of royalty is
2 called a "lump-sum" royalty. In a lump-sum royalty
3 agreement, the licensee must pay the entire royalty
4 amount up-front. In exchange, the licensee is granted a
5 license to use the patented technology for the remainder
6 of the patent term without any further expenditure. You
7 must first decide whether a running royalty or lump-sum
8 royalty would be adequate to compensate for any
9 infringement you have found.

10 After you determine the form of the reasonable
11 royalty, you must then determine the amount of the
12 royalty. If you determine the parties would have agreed
13 to a running royalty, you will be asked to determine what
14 royalty amount per infringing product sold the parties
15 would have agreed to at the hypothetical negotiation and
16 the number of infringing units sold. If you determine
17 that the parties would have agreed to a lump-sum royalty,
18 you will be asked to determine the up-front dollar amount
19 to which the parties would have agreed at the
20 hypothetical negotiation for a license to use the
21 patented technology for the life of the patent.

22 In making your determination of the form and
23 amount of a reasonable royalty, it is important that you
24 consider the date of the hypothetical negotiation and the
25 facts that existed at that time. Now, the damages

1 experts agree that the hypothetical negotiation would
2 have occurred in October, 2001, for infringement of the
3 '076 patent. You should also consider when infringement
4 first began, which will depend on whether you have found
5 infringement of one or both of the patents-in-suit and on
6 which products you have found to infringe. Infringement
7 began when Apple first made, used, sold, or offered to
8 sell an infringing product during the term of the patent
9 at issue. The '178 patent issued on March 24, 2009; so,
10 infringement of that patent could not have begun before
11 that date.

12 During the trial, you have heard evidence of
13 events that occurred after the time the infringement
14 first began. You may consider that evidence to the
15 extent it aids you in assessing what damages are adequate
16 to compensate for any infringement of a valid claim that
17 occurred.

18 Now, your determination does not depend on the
19 actual willingness of the parties to this lawsuit to
20 engage in negotiations. Your focus should be on what the
21 parties' expectations would have been had they entered
22 negotiations at the time the infringing activity began
23 and the facts that existed at that time. In determining
24 the reasonable royalty, you should consider all the facts
25 known and available to the parties at the time

1 infringement began.

2 I will now discuss some of the kinds of
3 factors you may consider in making your determination.
4 The first two facts are:

5 Whether the patent holder had an established
6 royalty for the invention or in the absence of such a
7 licensing hearing [sic], any royalty arrangements that
8 were generally used and recognized in the particular
9 industry at the time.

10 And, two, the rates paid by the licensee for
11 the use of other patents comparable to the
12 patents-in-suit.

13 When evaluating evidence about amounts paid
14 under other licenses or sales, you should consider
15 whether and to what extent such licenses or sales were
16 comparable; that is, were the technology exchanged and
17 the terms of the license or sale similar in terms and
18 scope to the technology of the patents-in-suit and the
19 license for the patents in the hypothetical negotiation.
20 In evaluating whether other licenses or sales are
21 comparable to the hypothetical negotiation, you may
22 consider:

23 How many patents were licensed.

24 The type of technology licensed and whether it
25 is similar or dissimilar to the technology of the

1 patents-in-suit.

2 What products were discovered by the license.

3 Whether the licensed technology was essential
4 to the licensed product or was only a small component or
5 feature of the product.

6 The magnitude of the royalty rate in the
7 license as compared to the price or value of the licensed
8 product.

9 And whether the license provided for an
10 up-front lump-sum royalty payment or for an ongoing
11 royalty payment based on the licensee's sales or usage of
12 the licensed technology.

13 Some more of the factors that you may consider
14 in making your determination as to the form and amount of
15 a reasonable royalty are:

16 The terms and scope of the hypothetical
17 license, such as whether it is exclusive or nonexclusive
18 or subject to territorial restrictions.

19 Whether the patent owner had an established
20 policy of granting licenses or retaining the patented
21 invention as its exclusive right or whether the patent
22 holder had a policy of granting licenses under special
23 conditions designed to preserve its exclusivity.

24 Five, the nature of the commercial
25 relationship between the patent owner and the licensee,

1 such as whether they were competitors or whether their
2 relationship was that of an inventor and a promoter.

3 Six, the duration of the patents and of the
4 license.

5 Seven, the established profitability of the
6 patented product or method, its commercial success, and
7 its popularity at the time.

8 Eight, the utility and advantages of the
9 patented property over the old products or methods, if
10 any, that had been used for accomplishing similar
11 results.

12 Nine, the nature of the patented invention,
13 the character of the commercial embodiment of it as owned
14 and produced by the licensor, and the benefits to those
15 who have used the invention.

16 Ten, the extent to which the infringer has
17 made use of the invention and any evidence probative of
18 the value of such use.

19 Eleven, the portion of the profit or of the
20 selling price that may be customary in the particular
21 business to allow for the use of the invention or
22 analogous inventions.

23 The portion of the profits that should be
24 credited to the invention as distinguished from
25 nonpatented elements, the manufacturing process, business

1 risks, or significant features or improvements added by
2 the infringer.

3 Thirteen, the opinion and testimony of
4 qualified experts and of the patent holder.

5 Fourteen, the amount for which a comparable
6 patent has sold.

7 And, 15, any other factors that, in your mind,
8 would have increased or decreased the royalty the
9 infringer would have been willing to pay and the patent
10 owner would have been willing to accept, acting as
11 normally prudent businesspeople.

12 No one factor is dispositive, and you can and
13 should consider the evidence that has been presented to
14 you in this case on each of these factors. The final
15 factor establishes the framework that you should use in
16 determining a reasonable royalty, i.e., the payment that
17 would have resulted from a negotiation taking place at
18 the time when the infringement first began between a
19 patent holder, such as Personal Audio, and a licensee,
20 such as Apple, assuming that both were reasonably and
21 voluntarily trying to reach an agreement.

22 You may not base the amount of a reasonable
23 royalty on the total sales of, total profits from, or
24 entire market value of the accused products. Instead, if
25 you find that a patent claim is infringed and do not find

1 that claim invalid, Personal Audio may only recover based
2 on the value added to an accused product by that claim.
3 In other words, the amount of the reasonable royalty that
4 you determine may not be greater than the portion of the
5 value of the accused products that is attributed to the
6 claimed invention.

7 You must disregard any testimony or evidence
8 that Personal Audio is entitled to any damages based on
9 technology incorporated in or profits received from
10 *iTunes* or any other Apple product that is not included in
11 the eight groups of accused products that I have listed
12 for you above.

13 Now, you may also award Personal Audio damages
14 for any infringement that may occur in the future if
15 Apple continues to practice any claim that you have found
16 to be infringed and have not found to be invalid. As
17 with past damages, the amount of future damages must be
18 adequate to compensate Personal Audio for the
19 infringement. In awarding future damages, you should
20 determine what amount, if any, you find adequate to
21 compensate Personal Audio for the conduct you found to
22 infringe that may, in reasonable probability, occur in
23 the future.

24 All right. Ladies and gentlemen, we're going
25 to go ahead and take a break for 15 minutes. When you

1 come back, Personal Audio's attorney will start with
2 final argument and then Apple's counsel will have final
3 argument and then Personal Audio will have a short time
4 for rebuttal.

5 I then have just a few instructions to read to
6 you on what you do when you go back to the jury room,
7 such as selecting a foreman and so forth; and then you
8 will retire to the jury room. I'll give you copies of
9 the last couple of pages of instructions along with the
10 appendices that I mentioned here, and then you start
11 deliberation.

12 Please when you go out on this break, even
13 though you have my instructions, don't start to
14 deliberate because you don't have the verdict sheet yet.
15 You don't know the questions. And just to let you know,
16 because the lawyers will be talking about it, you will
17 have a Jury Verdict Form when you go back. It has a
18 series of questions on -- it starts off with "Did you
19 find that Apple literally infringes any of the following
20 claims of the '076 patent" and then it lists the claims
21 and goes across by group. And, so, you'll do each of
22 those separately.

23 And then the same with the '178 patent.

24 Then there will be a page on anticipation
25 where you'll look at the claims versus the DAD system and

1 the DAD manual.

2 And then you'll have some pages on obviousness
3 where you'll go over the claims with each of the
4 combinations that I set out in the instructions.

5 So, I set out these combinations in the
6 instructions; and the verdict form will have places for
7 you to check each of those combos.

8 Then if you find that a particular claim was
9 infringed and you did not find it was invalid, you'll be
10 asked about damages. As I said in the instructions,
11 you'll first decide whether it's going to be a per-unit
12 running royalty or a lump-sum royalty; and then depending
13 on which of those, you'll be asked to decide how much.
14 You're not going to do both. It's not going to be a
15 running royalty and a lump sum. It's going to be one or
16 the other, and there's two different pages there for
17 that.

18 You'll have more detailed instructions than
19 that in writing when you come back, but at this time you
20 are excused and I will ask you to be back at ten of.

21 (The jury exits the courtroom, 9:33 a.m.)

22 THE COURT: All right. Do we have all of the
23 exhibits ready to go back to them except for the DAD
24 system?

25 DEPUTY CLERK: Yes, sir.

1 THE COURT: If they happen to ask to look at
2 or examine the DAD system, do we have that somewhere?

3 MR. STEPHENS: We do, your Honor.

4 THE COURT: Okay. So, it can be -- how long
5 is it going to take to set it up or whatever?

6 MR. STEPHENS: I think just a few minutes.

7 THE COURT: All right. Well, if we happen to
8 get that note that they want to see the DAD system --

9 MR. HEARTFIELD: Your Honor, it's in Judge
10 Giblin's old chambers; so, it can be wheeled in or they
11 could go over there if they --

12 THE COURT: Yeah. If they actually want to
13 see it run, I'm not sure what I'm going to do. We'll
14 have to talk about that. We'll probably have to set it
15 up in here, bring them in here and let everybody leave
16 except maybe someone to run it without talking. That's
17 going to be the tricky part. If they ask for it, we'll
18 deal with it at that time. I just wanted to be sure it's
19 around.

20 Okay. We'll be in recess, then, until ten of;
21 and you can start setting up whatever charts or whatever
22 you're going to use for final argument.

23 (Recess, 9:35 a.m. to 9:50 a.m.)

24 (Open court, all parties present, jury
25 present.)

1 THE COURT: Ladies and gentlemen, before we
2 start the final argument, let me mention two typos that
3 I'm going to correct; and I'll state these for the
4 record. On page 10, right at the bottom, it's stated and
5 I think may have read claims 6 and 13 of the '078 patent.
6 There is no '078 patent. It's supposed to be claims 6
7 and 13 of the '178 patent are dependent claims.

8 And then on page 22, about a third of the way
9 from the bottom, it says, "But you are not required to
10 give more weight to an item of prior" -- blank -- and
11 that should have said "more weight to an item of prior
12 art."

13 And in the final -- you'll take back to the
14 jury room a final set of instructions, and those two
15 typographical corrections will be made.

16 So, that's on page 10, right at the last full
17 line, "claims 6 and 13 of the '178 patent"; and on
18 page 22, about seven lines from the bottom, that should
19 be "more weight to an item of prior art."

20 All right. We will now hear the final
21 arguments of counsel. Since Personal Audio starts off
22 with the burden of proof on infringement, they get to go
23 first. Mr. Schutz.

24 MR. SCHUTZ: Thank you, your Honor. May it
25 please the court?

1 THE COURT: Counsel.

2 MR. SCHUTZ: Ladies and gentlemen, on behalf
3 of Mr. Logan, Mr. Call, and my colleagues, thank you very
4 much for your service.

5 This morning I'm going to start by stepping
6 back a little bit from the detail. I mean, we have been
7 mired in a lot of detail for a couple of weeks; and I am
8 going to start and talk about a few big-picture items to
9 begin with.

10 I'm going to talk about these numbers. These
11 numbers, I believe, are irrefutable truths as we step
12 back and we think about some of the bigger-picture
13 issues. 3,000 is the number that represents Apple's
14 patent portfolio. You've heard them say they've got a
15 lot of patents. They have 3,000 patents. They came into
16 this courtroom with not a single one of those patents,
17 waved it in the air and said, "We have a patent on the
18 invention that Mr. Logan and his colleagues got before
19 they did." And our date, remember, is October of 1996.
20 They could not come into this courtroom with a single one
21 of those 3,000 patents and claim that they invented what
22 we invented first. And that's important not only when
23 you think about some of the bigger-picture issues of
24 what's happened in this case. Apple is, of course,
25 claiming that our patent isn't infringed, it's not worth

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1 much, it's invalid. It's a little bit like saying "I did
2 not take your lawn mower, and it was broken anyway." And
3 that's really what they're trying to say here.

4 And, so, 3,000 -- if you just wrap your mind
5 around the fact that Apple has 3,000 patents and not a
6 single one of them come into this courtroom and waved as
7 either a prior invention or prior art.

8 60,000. Apple has, worldwide, 60,000
9 employees. Not a single one of those people have come
10 into this courtroom and said, "I came up with the idea
11 before Mr. Logan and Mr. Call did it." 60,000 people;
12 and they couldn't find a one to come into this courtroom
13 and say that that person came up with the idea first.

14 6 million. Patents are issued consecutively
15 by the United States Patent Office. The '076 patent was
16 the 6,199,076 patent issued by the Patent Office. Back
17 in October, 1996, when the patent was applied for, it was
18 something north of probably 5 and a half million patents
19 that had been issued at that time. They have not come
20 into this courtroom with a single patent from the United
21 States Patent Office, not a single one, in the whole
22 history of every patent that was filed before
23 October 2nd, 1996, and said, "Somebody else got a patent
24 on this before you guys did." They haven't come in here
25 with a single patent and said, "This patent, along with

1 some other patents, if you put them together, it makes
2 your invention obvious." Not a single one of the
3 millions and millions and millions of patents that have
4 been issued by the Patent Office.

5 16 million. 16 million is the number of lines
6 of software code that Dr. Almeroth reviewed, that he
7 reviewed when he looked at Apple's products and concluded
8 that they infringe the patents in this case.

9 Zero is the number of lines of software code
10 that we saw from Apple's key piece of prior art, the DAD
11 system.

12 I'd like to also talk briefly about a company
13 other than Apple, Sony. Mr. Fadell mentioned one of the
14 concerns that they had when they were bringing out the
15 iPod was that somebody else would beat them first. I
16 mean, he said that, of course, other people could do it;
17 and they were concerned about Sony beating them to it.
18 Sony. What about Sony? They were the world leader --
19 still are -- in consumer electronics. Not a single
20 person from Sony came into this courtroom and said, "We
21 are the folks in consumer electronics, and we came up
22 with this idea first." The best they've been able to do
23 is come in with a Sony Discman, and they're trying to
24 combine it with some other pieces of art to claim the
25 patent is obvious. We call that, on my side of the

1 aisle, "failures." They've got people who did not come
2 up with the invention; but if you ram it all together,
3 they think that makes the invention.

4 I also want to talk a little bit about some of
5 the promises that Apple made during opening statement.
6 Here's one. He said, "The one thing I'd like you to take
7 away" -- this is Mr. Cordell -- "is that Apple invented
8 the iPod."

9 Really? There is no patent on the iPod. They
10 designed a nice product. They designed a very successful
11 product. They packaged it. They marketed it great.
12 They added some improvements to it, but they didn't
13 invent. They have no patent on the iPod.

14 The best they have are some patents that came
15 along much later. For example, one of the patents
16 they'll probably talk about is the scroll wheel patent.
17 That was filed, first of all, well after 1996; and all it
18 covers is a scroll wheel. What that does, you take your
19 little finger and it goes up and down the menu. That's
20 all the scroll wheel does, and that's the patent that
21 they bring into this courtroom.

22 Another promise they made -- this is about
23 Mr. Fadell. And he said he had to find a way to create a
24 large storage device.

25 Well, the reality is Apple didn't create a

1 large storage device; Toshiba did. Apple borrowed or
2 used freely from the work and components that other
3 people came up with -- and again, they did a great job
4 assembling a product; but they overstate the invention
5 that they brought.

6 Now, here is another one. On damages, "We
7 look to comparability." And there are two licenses they
8 are talking about; and they said, "Both licenses that
9 Apple has taken from people with good technology, from
10 people that had real patents." That's the E-Data and
11 Digeo licenses.

12 What do we know about those two licenses?
13 Remember my conversation I had with Dr. Ugone when he
14 testified? Well, the E-Data patent, the only one
15 referenced and specified in the agreement, was expired
16 18 months before Apple even entered into a license
17 agreement and the license only related -- doesn't mention
18 anything about U.S. sales, only designated European
19 countries. And they want that to be a comparable
20 license? They're going to argue that that was a
21 comparable license; it was a lump sum; and you should
22 only award a lump sum in this case, not a running
23 royalty.

24 The other comparable license they've got is
25 this one to Digeo. All right. Well, a couple things

1 about that. Comparable technology. That's a figure out
2 of the drawing. We had testimony from Dr. Wicker where
3 he doesn't know whether that patent is valid, whether
4 Apple uses that technology, or whether it's infringed.

5 In this case, of course, if you get to the
6 damage question, you assume that the patent is valid and
7 infringed; and these are the only two licenses that they
8 relied upon for the comparability issue.

9 I'd also like to comment a little bit on who
10 Apple brought into the courtroom. We've had experts that
11 have testified in this case, and almost every expert
12 that's testified on both sides gets paid about \$500 an
13 hour. That's a lot of money; but that's the going rate
14 for experts in patent cases, as you can see, because both
15 sides have paid their experts that kind of money.

16 But we've got other kinds of people that have
17 come in here to testify. They're fact witnesses. They
18 aren't people that have spent hundreds of hours studying
19 software code, plowing through manuals, that have PhDs in
20 this complicated stuff that charge \$500 an hour. They're
21 fact witnesses. Mr. Tony Fadell came in here. He's paid
22 \$1,000 an hour; and, of course, this is an agreement that
23 Apple entered into on June 6th, 2011, merely weeks before
24 this trial started. And as the judge instructed you, you
25 can take some of these factors into account when you're

1 going to decide who to believe in this case and who not
2 to believe.

3 I'd also like to talk about Eugene Novacek.
4 Mr. Novacek is the person who built the DAD system. What
5 do we know about Mr. Novacek? Right? He had a
6 deposition taken, and one of the things -- questions that
7 was asked him was, "In your deposition you were asked if
8 you wanted Apple to win this case. Do you remember
9 that?"

10 He answered, "Yes. I recall that question."

11 "What did you say?"

12 Answer, "Something to the effect that it
13 really didn't matter to me that Apple won, more
14 importantly that the plaintiff lose."

15 Right? This is a guy that had an agenda. He
16 had an axe to grind for whatever reason. He's got an
17 agenda. He's a fact witness. He's paid \$500 an hour,
18 and he came in here with this system. He has charged
19 \$100,000 for his work on this case, and he didn't review
20 a single line of software code. I mean, Dr. Almeroth
21 charged a lot of money; but he reviewed 16 million lines
22 of software code. This guy didn't review any. He's paid
23 \$100,000.

24 Not only that, Apple bought the DAD system and
25 owns it, for \$75,000. So, he's paid \$500 an hour as a

1 fact witness.

2 Then what else do we know about Mr. Novacek?

3 Well, this is interesting. You know, generally I'd cut a
4 guy a little slack for exaggerating on his resumé a
5 little bit. Here, he did not have a master's degree; but
6 he put it on his LinkedIn profile.

7 But a couple other things that he did -- and
8 it's not only what he did, it's why he did it. The
9 DAD manual, which they're relying on as prior art is
10 DDX 1; and there was a circle R which indicates, you
11 know, a registration on there.

12 And he's asked, "Do you know why the circle R
13 is on the front page of your manual?"

14 "Because my vice-president of sales and
15 marketing wanted it there to make it look more realistic
16 and impressive."

17 In other words, he was going to take something
18 and make it appear something that it was not.

19 Then -- but there's more. ENCO is his
20 company. "Did ENCO actually file any patent applications
21 at the time?"

22 "No, we did not."

23 And, so, we asked, question, "Now, at the
24 bottom of the page there, on Defendant's Exhibit 1, it
25 says 'U.S. and Foreign Patents Applied For.' Do you see

1 that?"

2 "Yes, I do."

3 "Why does it say that?"

4 "Honestly because we didn't know better."

5 And then he blames it on somebody else and
6 says, "My VP of sales and marketing wanted to make it
7 look very real, impressive to potential clients like CNNs
8 and things of the world," again trying to portray
9 themselves as something they're not, which is exactly
10 what the DAD system was.

11 Okay. Now, they've got other witnesses.
12 They've got Dr. Wicker. When we put this together, it
13 was amazing to think about. I mean, just step back and
14 kind of absorb this. Dr. Wicker -- this is on the source
15 code issue. "Now, Dr. Wicker, did you ask Mr. Novacek to
16 provide source code for you to look at?"

17 "Yes, I did," he says.

18 Mr. Novacek -- this is in this trial right
19 here. "And I asked you if Dr. Wicker asked you to look
20 at any source code, if he can look at any DAD source
21 code; and you told me he had not asked you that, right?"

22 "That's correct."

23 So, Wicker's saying he asked; and Novacek is
24 saying he didn't ask.

25 Then we go back to work. "Now, in this case

1 you did not look at any source code for the DAD?"

2 "That's right. That source code was not
3 available."

4 He said that, I think, three times.

5 Back to Mr. Novacek. "At the time I asked
6 you -- do you, Mr. Novacek, have in your possession now a
7 copy of the source code for any versions of the DADs?"
8 This is -- he's talking about his deposition.

9 And he said, "Yes, I do."

10 Do you know what this is, folks? This is a "I
11 don't want to see any source code. I don't want to hear
12 about any source code." This is Apple's product they're
13 demonstrating. They own the DAD, for \$100,000 that they
14 paid Novacek and for the \$75,000 they paid for the
15 machine; you'd think they would get the source code and
16 look at it. They don't want to know what's in that
17 source code.

18 And this is just more. This is just more
19 Dr. Wicker testimony saying that it wasn't available.
20 And then at the end he said -- he's confronted. "Were
21 you here in court when he testified that it was
22 available?"

23 "It's my understanding that it was in a form
24 that I couldn't study."

25 So, first "I asked for it" and then he said he

1 didn't ask for it and then it wasn't available and,
2 "Well, maybe it's available but it's in a form I can't
3 study." But this is a PhD, right? And he can't get some
4 source code in a form that he can study?

5 You are entitled to think about -- you are
6 entitled to consider the credibility of witnesses here
7 that have come into this court; and I suggest that what I
8 just showed you impacts the credibility of Mr. Novacek
9 and Dr. Wicker, their two key technical people.

10 Now I want to move into a little more detail
11 on the issue of validity. Okay? And as you heard from
12 Judge Clark, there are two types of validity. There's
13 anticipation -- two types of defenses, anticipation which
14 means everything is in one piece, either an article or a
15 manual; and Apple is contending that the system, the DAD
16 system all by itself, is the same as the patent or the
17 DAD manual all by itself is the same as the patent.
18 Those are the only two things they're claiming is the
19 same as the patent. Again, no other patents, no other
20 articles, nobody else is going to come in here and claim
21 that they came up with this idea first.

22 And, again, because of limited time, I'm going
23 to jump into some technical things. I'm going to
24 necessarily have to skim over the top of this stuff.
25 We've had days and days of it, but it's just to highlight

1 your recollection of some of the things that happened.

2 This is a quick set of bullet points on why
3 the DAD system is not the invention. It doesn't have
4 skip commands, doesn't perform the claimed algorithms, no
5 source code, and then on the technical side of the
6 demonstration the playback_lookahead function transfers
7 audio files but not a playlist. Then, of course, you
8 have this after the transfer there is something called
9 the "DAD source file" that comes from the server computer
10 to the on-air computer. Remember the two computers that
11 were sitting here? The one to your right was the server
12 computer; the one to your left was the on-air computer.
13 And there was a demonstration that purported to show that
14 something came across the server computer to the on-air
15 computer, and you heard Dr. Almeroth testify yesterday
16 that what came over was not the playlist used. There had
17 to be a translation there.

18 And then I witnessed one of the most
19 incredible examinations I've -- cross-examinations I've
20 ever seen, which was Dr. Almeroth being questioned about
21 "Did you compare those files to see if they were the
22 same?" It's like wait a minute. It's their invention.
23 It's their DAD system. They have the burden to prove to
24 show that it's the same as the patent, and they're asking
25 our expert if he compared it? The question is why didn't

1 their expert compare it? Why didn't their expert come in
2 here and say it's the same?

3 Again, one of the themes that permeates this
4 case is Apple doesn't believe the rules apply to them.
5 The rules are if you want to kill a patent -- and that's
6 what they want to do; they want to kill these patents --
7 you have to do so by clear and convincing evidence. And
8 it's your burden, and it's a different burden. It's a
9 higher burden than our burden on infringement.

10 You may recall that during opening statement I
11 gave you just, you know, an example that might help you
12 understand a little bit how high of a burden that is and
13 how it's different than preponderance of the evidence,
14 and I used football scores with the -- I think it was the
15 2005 Texas National Championship team. They won
16 everything, went 13 and 0 that year. Four games they won
17 in which they scored 60 points. They beat Colorado 70 to
18 3. They beat Oklahoma 45 to 21. Those are clear and
19 convincing wins; and, yet, they want you to think that
20 they've met their burden of clear and convincing evidence
21 on the validity issues when they haven't produced any
22 source code, looked at any source code, didn't do the
23 kind of mapping that we did on the infringement side.

24 Infringement and validity, the proofs are --
25 it's flip sides of the same coin. And we'll get, in a

1 minute, to the proof that we did on the infringement; and
2 you compare that to what they tried to do on the validity
3 side.

4 And, again, this is just some more testimony
5 about, you know, no skip commands. We talked about that
6 a little bit. Just to refresh your recollection that
7 there was testimony on that point.

8 And, of course, now let's get to some of the
9 other prior art. I'm going to segue into some of that
10 other art.

11 Dr. Wicker didn't look at any prior art --
12 excuse me -- any source code. We looked at a lot of
13 source code, went through the claims, mapped the source
14 code. And one of the things you're going to hear from
15 Mr. Cordell -- I haven't seen his slides and I don't know
16 exactly what he's going to say, but I'll be willing to
17 bet a lot of money he's going to get up here and say they
18 don't do it the way the claims require on the source
19 code. He's going to talk about some source code in the
20 means-plus-function, and he's going to claim that they
21 don't do it that way. So, he's going to talk about
22 source code when it comes to infringement but he can't
23 talk about source code when it comes to validity because
24 they don't have it and their expert never looked at any.
25 And, yet, they want you to kill these patents.

1 Now, some other prior art they're relying on,
2 Sound Blaster, for example. Sound Blaster is not the
3 invention. So, when you get to the obviousness question,
4 what you have are things that are not the invention that
5 they want to combine and claim that, "Well, if you put
6 them together, it's the invention."

7 So, what you've got here, Sound Blaster is not
8 the invention. So, here we've got another technology
9 company that makes a product called "Sound Blaster"; and
10 nobody from Sound Blaster came into this court and said,
11 "Hey, we've got a patent that was first." No employee of
12 Sound Blaster came in here and said, "Hey, we thought of
13 it first."

14 Sound Blaster is a failure to come up with the
15 invention. That's what Sound Blaster is.

16 The Sony Discman also is not the invention.
17 You know, if you squish it together with some stuff, they
18 think it's the invention. So, what is it? It's a
19 failure to come up with the invention by Sony, not just
20 by any Tom, Dick, or Harry out there. Sony didn't come
21 up with this invention either.

22 And then, of course, Dr. Almeroth says it
23 doesn't matter. There is no combination out there that's
24 the invention because there was no source code provided
25 for anybody. He had to go through source code to prove

1 infringement, but Apple doesn't think the rules apply to
2 them and they don't have to go through source code to
3 prove invalidity.

4 This is a very interesting graphic and very
5 telling, I think. Our patent application was filed on
6 October 2nd, 1996; and eventually MP3 players started
7 coming on the market. The evidence that's in this trial
8 is that the first MP3 player that came on the market was
9 1998, this Rio 300. And the Rio 300 did not have the
10 capability to download or receive navigable playlists.
11 That capability didn't come along until sometime in the
12 2000 time frame. And, so, it's several years after our
13 patent application was filed that technology companies
14 finally got around to making audio players that could
15 receive or download these navigable playlists.

16 And just a comment on that phrase, too, by the
17 way. Counsel tried to beat up Dr. Almeroth for using
18 that phrase. It's not in the patent. All right? It's a
19 phrase that I came up with as a way to try to have a
20 shorthand for all the technology in there; and I think it
21 fairly characterizes really, at the big-picture level, of
22 what the technology is. And we have to have some
23 shorthand, or we'd never get through this trial. I mean,
24 we just have to have some way to communicate in a fashion
25 that allows us to say. But it's what's in the claims

1 that count. I'm just using shorthand when I use that
2 phrase, and it's kind of been picked up by various people
3 around the courtroom.

4 Now let's switch. So, we've talked about
5 validity. Now I want to switch to infringement. And,
6 again, Apple had the burden to prove by clear and
7 convincing evidence. We have the burden on infringement
8 by preponderance. So, let's look at what we did to try
9 to meet that burden.

10 Here is just kind of a montage of the
11 materials that Dr. Almeroth looked at. And you'll
12 remember he was on the stand for several days going
13 through this. He looked at manuals. He looked at
14 schematics. He looked at parts lists. He looked at the
15 devices themselves; and, of course, he looked at
16 16 million lines of software code.

17 This (indicating) is a chart that we put
18 together just to show that even though there's a lot of
19 moving pieces here and it's complicated the way the
20 things are set up, there is a bunch of overlap on how
21 these patent claims are set up; and we've broken this
22 down by patent group and by certain claim elements and
23 then where you find some of this information in the Apple
24 patents *[sic]*. It's just to remind you a little bit
25 about what that testimony was like.

1 So, first, let's start with this. Dr. Wicker
2 admits that Dr. Almeroth is right about how the iPods
3 work, in terms of how the source code operates. You will
4 have back in the jury room a series of exhibits -- They
5 may be about 20 pages even -- that are 771A through -- I
6 think it's 781A. The numbers are in your jury
7 instructions. And what these are are fairly
8 straightforward charts by Dr. Almeroth that Dr. Wicker
9 has agreed to are accurate summaries of how the source
10 code operates. There is no dispute about how it
11 operates.

12 You'll also have some demonstratives that were
13 put together by Dr. Wicker. And the judge instructed you
14 on what those are. We don't agree with those, and
15 Dr. Almeroth doesn't agree with those either.

16 So, what you're going to have between the two
17 experts is you're going to have one that both of them
18 agree to and you're going to have one that only
19 Dr. Wicker thinks is correct.

20 Now, let's walk through some of the
21 infringement issues here. And what I want to do is --
22 again, I've got some limited time; but I want to try to
23 be fair to Apple here. So, I went to the slides that
24 Dr. Wicker used and tried to figure out, okay, what's the
25 real dispute here that Dr. Wicker is complaining about.

1 And, so, he said that -- well, I've got these three
2 questions that I have to answer. So, Dr. Wicker only
3 challenged parts of what Dr. Almeroth went through.
4 Dr. Almeroth went through painstaking detail of every
5 single claim element in each of the two patents, and
6 Dr. Wicker did not do that. He focused on a few things,
7 and that's what I'm going to try to do here in the
8 limited time I've got.

9 I'm going to start from Number 3 and work my
10 way back up because the next slide -- and, again, this
11 is -- I've decided to take their slides and put them in
12 my presentation here. This is what Dr. Wicker thinks.
13 He's claiming that the structures are not equivalent.
14 You've got to remember these are 112 ¶6, these
15 means-plus-function claims. And for many of them, the
16 issue is is the structure equivalent. Dr. Wicker says
17 no; we say yes. And I've used their slide to actually
18 kind of guide us through a little bit of what we're doing
19 here.

20 So, the first thing is the means for
21 receiving. And you will remember the shorthand for that
22 is this IrDA link. Is the USB cable that Apple uses to
23 connect their computers together, the iPod with the
24 computer that the playlists are downloaded from, is that
25 the equivalent of an IrDA link? They say no; we say that

1 it is equivalent.

2 Here's the court's claim construction.

3 But -- so, a couple things. First, we've got
4 their -- the port is a port for connecting, that really
5 shouldn't be in any dispute at all. That's out of their
6 documents.

7 Now, you don't have to take -- I think
8 Dr. Almeroth is right and you should believe him for
9 everything he says, but you don't have to limit your
10 conclusions here to what he said. Look at what Mr. Dave
11 Heller said in a patent that he went to the Patent Office
12 and filed. They're talking about this peripheral cable
13 212, that if you go back and remember the drawing, it
14 basically connects what looks like an iPod to a computer.
15 And he's saying that that can either be a FireWire or a
16 universal bus. Alternatively, that cable can be replaced
17 by a wireless link. Now, this is what he said to the
18 Patent Office; and this is important. They said this to
19 the Patent Office before this lawsuit was filed, before
20 any lawyers got involved, and before anybody had to, you
21 know, kind of change their story a little bit. But
22 there's more.

23 So, Dr. Wicker talked about Apple's scroll
24 wheel patent and then on cross-examination we pointed
25 out, "Oh, by the way, let's take another look at

1 something in that scroll wheel patent." And in the
2 scroll wheel patent, again that Apple took to the Patent
3 Office, it talked about a data port. Remember that's
4 what we're talking about in the claims here. And it says
5 the data port can be a USB port or a FireWire port.

6 Then it goes on and says it can be a radio
7 frequency link or optical infrared link to eliminate the
8 need for a cable.

9 So, Dr. Wicker apparently is willing to stake
10 his credibility by arguing that an IrDA link is not the
11 same, structurally equivalent, as that USB cable.

12 One of the things you heard them talk a lot
13 about is about the speed of data transfer. If you look
14 at the claim construction definition, there is nothing in
15 there about speed of data transfer; and Apple doesn't
16 mention anything before the Patent Office and to say IrDA
17 won't work because it's too slow. That's a red herring.

18 And then of course we've got the chip. The
19 predecessor 7209 chip, one of the Cirrus chips that Apple
20 was considering for the iPod. And it, of course, talks
21 about having an IrDA protocol encoder/decoder on that
22 chip as well.

23 Now let's talk about the NAND flash issue.
24 That's the persistent storage issue. Dr. Wicker is
25 trying to claim that these later devices that don't have

1 a hard drive, a spinning hard drive, what's called "NAND
2 flash" are not structurally equivalent; but here is his
3 testimony.

4 I said, "You agree that NAND flash is
5 persistent mass storage?" That's the claim term,
6 "persistent mass storage."

7 He said, "Yes. Yes, definitely."

8 "Do you think this says that the persistent
9 mass storage device has to be a magnetic disk memory or
10 an equivalent?"

11 "No. It simply says 'such as a magnetic disk
12 memory.'"

13 And then later on his opinion is that the NAND
14 flash doesn't satisfy the persistent memory claim
15 limitation.

16 Now let's go to the keyboard and the buttons.
17 Every time I've looked at a keyboard, it's got buttons on
18 it. That's got a Z button, an X button, a C button,
19 et cetera, et cetera. Keyboards just happen to have a
20 lot of buttons. All you have to do is have a structural
21 equivalent. You push a button; something happens. This
22 is really another red herring.

23 There's testimony on that.

24 Now the sound card. Right? So, a sound
25 card -- let's go back and look at the court's claim

1 construction. One of the things it says is that it
2 includes a digital-to-analog converter. A sound card is
3 a bunch of chips on a board and again things get smaller
4 and cheaper and it is now down to a codec.

5 Apple agrees -- this is their answer to
6 questions; they had to answer these questions that we
7 asked -- that all the iPods, in fact, have a
8 digital-to-analog converter.

9 This chart I put up here just to remind you
10 that there are some differences and some of these
11 limitations we've talked about are, in fact, not required
12 by all the claims. At the end of the day, they're all
13 met. But just to remind you that there are some
14 differences between these claims.

15 Now let's go to this downloading issue. Apple
16 downloads playlists. Here's the press release they put
17 out in October, 2001, when they announced to the
18 public -- and again this is before the lawsuit was filed,
19 before anybody had to go back and look, "Jeez, what do we
20 say in court?" There were none of those considerations.

21 And they said, "Hey, plug your iPod in. It
22 automatically downloads your playlist."

23 And they also put that in their manual. Plug
24 it in; download your playlist.

25 And they put it in a patent, too. Right? And

1 they say that, you know -- I mean, you can see a picture
2 there, a scroll wheel. Looks like an iPod. Plug it in;
3 it downloads a playlist. Right?

4 Now, one of the issues for -- I believe this
5 is the '178 patent only. I'm going to go a little
6 technical here, a couple things. As you heard from
7 Judge Clark, that is the claim element on the port for
8 downloading we are arguing is met by the doctrine of
9 equivalents, that it's -- the differences are
10 insubstantial, that it serves the same -- does the same
11 function in the same way to achieve the same result.

12 And iPods have a communications port, again
13 for doing the identical function and achieving the
14 identical result, which is (reading) transferring a
15 plurality of separate digital compressed audio files and
16 a separate sequencing file from the memory of one or more
17 separate computers to the memory of the player upon a
18 request by the player.

19 And you heard Dr. Almeroth talk about what
20 constitutes a request. You plug it in and it says --
21 there is a voltage drop, and it's kind of the equivalent
22 of "here I am." I'm just trying to refresh your
23 recollection that Dr. Almeroth went through that. That's
24 met.

25 And again, so, it is a request to initiate a

1 transfer.

2 Again the iPod is programmed and designed upon
3 initiating the connection to receive the download from
4 the computer, including the songs and the playlists.

5 This is some more -- just to refresh your
6 recollection, some more of the information on that.

7 Now I want to move to some of these software
8 claims. You remember that another part of what
9 Dr. Wicker talked about was that the software limitations
10 were not met. Well, the judge has described for you what
11 an algorithm is; and you've got it here. It's, you know,
12 a fairly broad statement, "a formula or series of steps
13 for accomplishing some purpose, for instance a series of
14 steps performed by a computer to accomplish some
15 function." And it "may be expressed in many ways, such
16 as in a mathematical formula, in computer code, in words,
17 or as a flow chart."

18 Another thing you may hear during counsel's
19 closing argument is that the patent was written at the
20 time and that the software talked about in the patent is
21 written in a language called "Pascal." The computer
22 language used by the iPod is either C or C++. And there
23 is no distinction that it has to be a specific computer
24 language. The key things are both computer languages and
25 most of us can't read them and that's why we need

1 experts. But there's no distinction; and Apple cannot
2 get off the hook here by claiming, "Well, ours is written
3 in C computer language and what Mr. Call talked about
4 when he drafted the patent application was Pascal."

5 So, now let's talk about one of the issues
6 that Apple has talked a lot about. We're calling this
7 the "LocType issue." All right? And how that fits into
8 the claims are -- it's really skipping forward and you
9 can see that there is a three-step algorithm that the
10 judge talks about here in the claim construction and
11 basically it's -- the claim language is, you know,
12 (reading) means responsive to a first command for
13 discontinuing the reproduction of the current song and
14 instead going to the beginning of the next one.

15 So, that's the skip-ahead feature. And it
16 also relates to the skip-back issue. That's the LocType
17 issue.

18 So, what's the evidence on it? Right? Well,
19 first of all, we've got Apple agreeing that all the
20 iPods, in fact, have an algorithm for navigating through
21 a playlist. They all have an algorithm for doing it.
22 They've admitted that.

23 You remember also that there was a lot of
24 discussion about Figure 5 of the patent and what's put up
25 here on the slide is not Figure 5 from the patent but a

1 demonstrative showing that all of the items in that
2 sequencing file can be of the same type and can be songs
3 and that's exactly what Apple does.

4 Then if you go into the source code itself --
5 we presented a lot of evidence on this, folks. You go
6 into the source code itself; and if you look at the top
7 box there, you can see that the first thing that you have
8 there is a comment. It says, "Find the next song in the
9 playlist that is selectable." Remember in software if
10 you've got the double hashes it doesn't start a command;
11 it's just a comment for the programmer so they know
12 what's going on.

13 Then you see the code, "GetNextPlaylistTrack."
14 So, that's the skip ahead. All right?

15 And then later on, you go backwards with the
16 same software code.

17 So, we went into the software, went deep, and
18 they have exactly the same thing. It doesn't have to say
19 "LocType." There is no requirement that the word
20 "LocType" be found in the software. It just has to be --
21 it has to do that. It has to be the structural
22 equivalent of what's set forth there, and it is.

23 And here is some more of the same thing with
24 the skip backward function.

25 And then they made a lot of hay about the fact

1 that there is no R record. There is no requirement for
2 an R record. You can look through -- this is the court's
3 claim constructions. You can look through there. You
4 won't find anything. It talks about LocType, doesn't
5 talk about R record.

6 And here's just a chart about the different
7 generations of iPods and models.

8 Now I'd like to spend a few minutes talking
9 about the profit apportionment and the damages issue.
10 Here's the debate. We've got their expert saying, "If
11 you find infringement, the patents are valid, it's
12 \$5 million lump sum. That's it."

13 We believe that the appropriate measure of
14 damages in this case is a running royalty of an amount.
15 Mr. Nawrocki arrived at that amount by starting with
16 Apple's profits and giving Apple most of the credit for
17 everything. Started out with profits of between \$32 and
18 \$34 and apportions all of that to come down to the profit
19 that's associated with the inventive contribution here
20 and he gives it to be 90 cents. All right? We can't ask
21 for, have not asked for -- not even close -- for all of
22 Apple's profits on the iPod. We've asked for what we
23 think is the fair portion that our patent and our
24 technology contributes to it.

25 All right. One of the complaints that Apple

1 has about the work that Mr. Nawrocki did was the price of
2 iPods have gone down over time. Yes, they have. They
3 have gone down over time. But what's happened is the
4 profits have gone up.

5 So, Mr. Nawrocki started with 32 to \$34. The
6 actual profit is 41 bucks. So, if Mr. Nawrocki had said,
7 "Yep, you're right. You're right. The price has gone
8 up; so, what I'm going to do is redo my calculations
9 using a lower price but higher profits" -- because what
10 he apportioned was profits. So, Apple got the benefit of
11 what Mr. Nawrocki did. They got the benefit of
12 Mr. Nawrocki starting from a lower profit number than the
13 actual profit number even though the price of the device
14 went down.

15 And then part of what Mr. Nawrocki did was he
16 looked at a lot of surveys, looked at a lot of Apple
17 documents; and all of that went into his allocations of
18 how much to attribute to the various items.

19 Now, I'd like to talk just a little bit about
20 the lump-sum versus running royalty issue. Apple --
21 first of all, on this issue, go back to -- remember what
22 I talked about, the Digeo agreement, E-Data agreement.
23 They're saying, "Okay. Those were lump-sum deals that
24 Apple negotiated. Just look at that. Don't think about
25 anything else. And that's why it should be a lump sum."

1 That's one of the things they're arguing here.

2 Those are not comparable licenses, folks.
3 They're just simply not. One is with an expired patent
4 only relating to Canadian/U.S. sales. The other one,
5 Dr. Wicker had no idea whether Apple was using it,
6 whether it was infringed, whether it was valid. The
7 technology was simply not comparable.

8 The point of this exhibit, Plaintiff's
9 Exhibit 745, is simply to show that Apple, in fact,
10 understands that in some circumstances they're going to
11 have to pay for stuff by the unit. And they've got
12 licenses here where they have clearly, clearly thought
13 about and incorporated into their thinking early on that
14 they would have to pay by the unit.

15 And Dr. Ugone -- it depends on who's paying
16 his bill how he testifies, right? When he's testifying
17 on behalf of the patent owner, he always gives the option
18 of a running royalty. But when he's testifying on behalf
19 of the defendants, he comes in here and says, "No. No
20 running royalty. Simply not appropriate."

21 So, this is another slide that Dr. Ugone put
22 together. The real-world facts are important. "Well,
23 the real-world facts are not comparable here." Apple
24 comparable licenses, they have E-Data and Digeo. Those
25 are not comparable licenses.

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1 And then Concert. Let's talk about Concert a
2 little bit. All right? Concert Technology is a
3 5-million-dollar issue here. Concert was a middleman.
4 Concert wasn't Apple. Okay? You will see all over these
5 jury instructions that it should be a reasonable royalty
6 for the use made of the invention. I don't know how I
7 can stress it any more. It's for the use made of the
8 invention. Concert was not going to use the invention.
9 All right? What they were going to do is take it and
10 then go to somebody and either sue them or try to license
11 to somebody that actually was going to use it. Concert
12 simply wasn't in that business. That's not comparable
13 and should not drive the decision in this case.

14 DEPUTY CLERK: Mr. Schutz, you have ten
15 minutes.

16 MR. SCHUTZ: Thank you.

17 And then the Made for iPod licenses, the only
18 point there is that when Apple is on the other side of
19 the bargaining table where somebody comes to them for
20 technology, they demand that they be paid by the unit
21 there.

22 Okay. I'm not going to go through this again.
23 You've seen it. I gave all their witnesses opportunities
24 to say this technology could be taken off, this
25 technology could be removed. I asked Mr. Fadell that, I

1 asked Mr. Heller that, and I asked Mr. Ng that. I kept
2 asking him, "Well, what could you take off?" I didn't
3 suggest that they could take anything off. I just asked
4 an open-ended question. And none of them jumped and
5 said, "We'll get rid of the technology that's in dispute
6 in this case." Didn't do that.

7 And, so, this (indicating) is what they would
8 take off. That's it.

9 So, what do we have at the end of the day?
10 93,795,429 units sold. And Mr. Nawrocki has given a
11 royalty rate range of 63 cents to \$1.34 here for that.

12 Now I'd like to spend just a moment, ladies
13 and gentlemen, talking about the special verdict form.
14 Okay? You're going to get this form; and, so, here's
15 what all of this means. If you want Personal Audio to
16 win, this is how you're going to have to fill the form
17 out. If you want Apple to win, Mr. Cordell is going to
18 tell you how the form should be filled out.

19 If you want us to win on the infringement
20 questions, you just check them "yes." Okay?

21 And there are a couple of pages of
22 infringement questions; and, so, it's "yes" on all of
23 those.

24 And when you get to the validity questions,
25 where has Apple proved by clear and convincing evidence

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1 that these patents should be killed, you'd check those
2 "no" if you want us to win.

3 And there are several pages of those with
4 different combinations that the judge has talked about.

5 Then when you get to the damages question,
6 you're going to be asked per-unit running royalty or
7 lump sum. If you want to check the box "lump sum," which
8 they're going to ask you to check, that's it. There's --
9 Apple can use this technology and they can sell a
10 hundred million, 200 million, a billion units. They can
11 incorporate it into new devices in the future and
12 everything else; and whatever that lump sum, that's it.
13 There's no sharing in the success based on our
14 technology, which they have said they would not take off.
15 I mean, nobody's come in and said, "We've got another way
16 to do it; so, we can take it off." They've all said, "We
17 need it, and we're not willing to take it off." And in
18 that circumstance they should have to pay something for
19 that each time they sell one of these products. And
20 we're not forcing them to keep it on. They can take this
21 technology off if they need to.

22 Now, what I have not done here is this
23 93 million units and you've got to put a per-unit total
24 in there. I try a lot of these cases. I never, ever
25 suggest to the jury what number to put in there. I go

1 through what our damage expert did. You've heard the
2 evidence. You can make the evaluation, and you put what
3 you think is a fair number in there. I'm not going to
4 suggest a number that you should put in there.

5 Ladies and gentlemen, I've saved a few minutes
6 to talk to you at the end after Mr. Cordell is done. So,
7 I will be back. I'll give you an interim "thank you" at
8 this point and turn it over to Mr. Cordell.

9 THE COURT: All right. Mr. Cordell.

10 MR. CORDELL: Thank you, your Honor. May I
11 stand here?

12 THE COURT: Yes.

13 MR. CORDELL: Thank you.

14 THE COURT: You can pull the microphone over
15 and it will pick you up.

16 Do you want to go ahead and get that chart
17 down, sir?

18 MR. SCHUTZ: Oh, yes.

19 MR. CORDELL: May it please the court?

20 THE COURT: Counsel.

21 MR. CORDELL: Ladies and gentlemen of the
22 jury, counsel, assembled visitors and observers, I'm
23 going to echo Mr. Schutz's comments about thanking you
24 for your service. We understand this is a burden on you,
25 but we also understand that this is public service at its

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1 highest and a lofty kind of thing you could do. So, we
2 really, really appreciate it and however your decision
3 comes out in this case, we know you'll be fair and again
4 we want to thank you for your service.

5 Somebody mentioned that when I gave my opening
6 statement, I failed to really introduce myself. So, I
7 wanted to apologize about that. I didn't tell you where
8 I was from or where I lived or anything like that. I
9 actually grew up about two hours east of here in
10 Lafayette and then -- but I make my home now in Virginia.
11 I work in the Washington, DC, area; and my wife and I
12 have lived up there for a while now. We've got three
13 kids and -- but I try to get back to Texas as often as I
14 can.

15 Let me first start by just telling you that,
16 you know, in these cases we're always taught as lawyers
17 that we're supposed to come up with something catchy and
18 witty at the beginning of our closing statements. You
19 know, the other lawyers will laugh at you if you don't do
20 it. So, I stayed up half the night last night because I
21 was trying to think of something that, you know, would be
22 witty or rhyme or, you know, something I could key off
23 of. And, ladies and gentlemen, I just couldn't do it. I
24 tried for three hours to think of something that would
25 rhyme with "algorithm," and there is no such word. It

1 just doesn't exist.

2 But that's what this case is about. It's not
3 about catchy slogans. It's not about platitudes. This
4 is about hard technology and whether or not Apple is
5 using this very dense, very, you know, difficult
6 technology. And that's what we're here to talk about.

7 So, Mr. Schutz brought up quite a few things
8 in his closing and I won't be able to address them all,
9 but let me just speak to a couple of them. He talked
10 about, "Well, Apple has 3,000 patents." Ladies and
11 gentlemen, we're not here to talk about Apple's patents.
12 I wish we were. I wish we were.

13 But one of the things that he said that struck
14 me is he said, "You know, there's no Apple patent on the
15 iPod." Well, ladies and gentlemen, this is one of the
16 patents (indicating) that we're going to talk about
17 during my closing statement. We're going to focus on
18 this quite a bit. But look at the face of this. I'm
19 going to leave it to you to decide whether or not Apple
20 has any patents on the iPod.

21 For the record, this is DX 199.

22 Now, there is a picture of the iPod right on
23 the face of the patent.

24 He said, you know, we have all these employees
25 and we didn't pull any of them in here to tell you that

1 the patent was invalid. Well, ladies and gentlemen, we
2 brought you the best invalidity evidence we could; and we
3 chose those witnesses that had knowledge and could inform
4 this decision. That's why.

5 So, those things are distractions. Those are
6 distractions. We need to get to the real issues, and we
7 need to talk about those. And I'm not going to talk
8 about distractions. I'm not going to bring up the fact
9 that, you know -- "Do you remember Personal Audio had
10 that little tax problem at the beginning of the case" or,
11 you know, this business about them coming down to Texas
12 when they had never been to their offices or don't know
13 where they are. Those are distractions; and, so, I'm not
14 going to talk about that.

15 Instead, what I'm going to try to do is focus
16 on the issues and try to give you a review of the
17 evidence that we've seen and why we think it supports
18 Apple at the end of the day here.

19 So, let me get into it.

20 One thing that I think we have proven beyond a
21 shadow of a doubt -- and I dispute what Mr. Schutz
22 said -- is that in fact Apple did invent the iPod.
23 You've heard all of this evidence about the fact that the
24 iPod can hold 20,000 songs and 100 hours of movies and
25 has these patented controls.

1 You heard evidence about how it changed
2 people's lives. Suddenly they could actually -- you
3 know, when they were in a job that was kind of boring and
4 they needed to listen to music, they could take their own
5 music with them. They weren't tied to that radio
6 anymore. It made people's lives better.

7 One of the other things that we heard is that
8 this technology, the technology that made this work,
9 really didn't exist before 2001, didn't exist. And what
10 were those key features? Those features were like the
11 1.8-inch hard drive.

12 And Mr. Schutz says, "Wait a minute. Apple
13 didn't invent the 1.8-inch hard drive."

14 Ladies and gentlemen, the testimony, the
15 actual evidence, was that Toshiba had come up with it;
16 but nobody was using it. Nobody had found any useful
17 purpose for it, and it was the Apple folks who decided
18 that they would make this new device using this
19 remarkable technology.

20 The accelerating scroll wheel, how hard would
21 it be -- we're going to talk about this a little later.
22 But imagine how hard it would be if you had a thousand
23 songs on your iPod, to press the "skip" button a thousand
24 times. If you wanted to get to Song Number 647, you're
25 going to press it 647 times. Wouldn't be workable.

1 Nobody would want to use it. So, Apple had to come up
2 with a new way to do it; and they did with this
3 accelerating scroll wheel that lets you go through
4 hundreds of songs in a very short amount of time.

5 Fast connections. If you're going to have a
6 thousand songs on an iPod -- we're going to talk about
7 this a little later -- you wouldn't sit there for 8 or 10
8 or 13 hours to let the music transfer over. You've got
9 to do that in a reasonable amount of time; so, Apple had
10 to come up with new ways to connect the iPod to a
11 computer, things like the FireWire that you've heard
12 about.

13 And then, finally, the innovative design. We
14 haven't talked very much about this, but you saw the
15 awards -- some of the awards that Apple won. The reality
16 is, ladies and gentlemen, that it's kind of a neat little
17 device. It's small. It fits in your pocket, and it has
18 the kinds of features that people thought were good to
19 have. And those are the things that made the iPod work
20 and made this invention, and I don't think there is any
21 dispute that this was Apple 's invention.

22 You heard from the engineers. You heard from
23 Mr. Heller and Mr. Fadell and Mr. Ng and Mr. Boettcher.
24 And when they testified, they gave you a lot of useful
25 information. I'm not trying to distract you from that

1 because that's what's really important, When they told
2 you about their products and how they worked.

3 But the one thing that struck me when they sat
4 in that witness chair was that every single one of
5 them -- and remember they didn't hear each other
6 testify -- I guess Mr. Heller heard the others because
7 he's here. He is our corporate representative, but he
8 was the first one to testify. And every single one of
9 those witnesses talked about one thing, how proud they
10 were of this device and how proud they were of this work.
11 It was almost like listening to somebody talk about their
12 children.

13 I'm sure they love their children more than
14 the device, but it had to strike you. It just had to
15 strike you.

16 But what else did we hear from these guys? We
17 heard the same messages over and over. We heard they had
18 never heard of Personal Audio, they had never heard of
19 Personal Audio's patents. And they did their own work
20 when they were developing and improving the iPod.

21 So, there's no suggestion in this case that
22 somehow Personal Audio taught Apple anything. There is
23 no transfer of technology.

24 Mr. Schutz in his opening -- I guess now two
25 weeks ago -- said, "Well, you know, that doesn't matter.

1 That doesn't matter. You don't have to show that
2 somebody copied or that they saw the Personal Audio
3 products." And he's right about that. He's right.

4 But, ladies and gentlemen, what he's got to
5 prove then is that somehow these very talented engineers,
6 as they were doing this difficult job of inventing this
7 iPod and developing this iPod, that these engineers
8 somehow stumbled into the same specific technology that's
9 in the Personal Audio patents. And they've got to prove
10 that to you. They've got to prove that. And they can't
11 just throw up their hands, and they can't resort to
12 platitudes. They've got to zero in and they've got to
13 convince you that, in fact, those very, very specific
14 claims somehow found their way into the iPod.

15 The fact of the matter is, ladies and
16 gentlemen, this iPod looks nothing like that patent,
17 absolutely nothing like it. And if you look at Figure 1
18 of the patent -- and we've added a couple labels here
19 just to remind you of what's what. The server side is
20 over here (indicating) on the left, and the player
21 computer side is over here (indicating) on the right.
22 And you can see it's got a keyboard and a display and a
23 CPU. It's got all the stuff that a computer has. That's
24 what they had. That's what they invented.

25 But when you look at the claims, when you look

1 at what really matters -- and we're going to talk a whole
2 lot about this, and I was kind of surprised that
3 Mr. Schutz didn't take you through this. When you look
4 at what the judge has said these claims actually mean --
5 and this is one of the definitions that we're going to
6 talk about. It's at page 3 of your juror notebook.
7 Remember this is the one I had you circle during the
8 opening.

9 When you look at this, this is not just a
10 player. This is not a downloadable navigable playlist,
11 whatever it is that Mr. Schutz has used. This is a very,
12 very specific algorithm, what computer people would call
13 a "structure." This is a very, very specific method.
14 It's a recipe, if you will, for how the software
15 accomplishes a particular function. This is what they
16 have to prove. They don't get to walk in and say, "Hey,
17 you've got a player. That must infringe."

18 They've got to look at this, and they've got
19 to convince you that this is actually being used. And
20 remember it's their burden, ladies and gentlemen. So, if
21 for some reason you don't believe one side or the other
22 or you can't figure it out, they have to lose, because
23 they've got to convince you that this is being used.

24 So, let me get into that. I'm going to talk
25 about some other big differences, some of the structural

1 differences that Mr. Schutz talked about; and we'll get
2 into those in a fair amount of detail. And then I'm also
3 going to talk about this doctrine of equivalents issue
4 that he touched on. I'm not going to spend a lot of time
5 on it here because I've used too much of my time already,
6 it turns out.

7 Let me just pause for a moment and address the
8 slogan that Mr. Schutz used, the shorthand, this idea
9 that this patent is really about an audio player that can
10 receive or download navigable playlists. And I was glad
11 to hear him say in his remarks that of course his expert
12 never said anything about that because it's something
13 that he came up with. And he did. He did. And I'm not
14 faulting him for that.

15 What I am faulting him for is suggesting to
16 you that that's enough, that you can look at that and
17 stop, that you can say, "Well, if they're downloading
18 playlists, there must be infringement" or "if you can
19 navigate through a playlist, there must be infringement,"
20 because that's not what this case is about. Remember
21 what their witnesses said. Remember what Mr. Call said.

22 We asked him, you know, "Did you invent the
23 idea of downloading audio files?"

24 And he said, "No."

25 We also said, "You also didn't invent the idea

1 of storing downloaded audio files on a hard drive?"

2 "Right."

3 "You didn't invent sequential playback of
4 audio files?"

5 "Right."

6 So, this idea that you have an audio player
7 that can receive or download, that's not the invention.

8 This business about navigable playlists, we
9 said, "Hey, wait. CD players from way back when could
10 skip forward or backward from a currently playing song."

11 He said, "Yep. I suspect they could."

12 That was in the prior art. That's not part of
13 the invention.

14 We also spoke with Mr. Goessling. Remember
15 Mr. Goessling is the only inventor here who is not
16 connected to this case. He's the only inventor who
17 doesn't stand to benefit anything from this case.

18 So, when we asked him, we said, "You know,
19 would you agree that there were software players in the
20 marketplace before you got involved that would allow you
21 to create playlists of audio files that you brought into
22 your PC from somewhere else and then skipped forward?"
23 So, you had to bring in those audio files and then skip
24 around through them.

25 "Sure looks that way," he says.

1 "Okay. So, you guys didn't invent that
2 notion, right?"

3 "I don't think we did."

4 "And similarly, the notion of skipping back,
5 you didn't invent that either, right?"

6 "As I said, this looks like it does those
7 things; so, probably not." Probably not.

8 So, ladies and gentlemen, the shorthand we've
9 got to be real careful of and the fact of the matter is
10 that's not what the invention is and the time has come
11 for us to really focus on it.

12 Let me pause just briefly on playlists because
13 we've heard so much about playlists. But the fact of the
14 matter is Mr. Call sat in that witness stand and he told
15 you that, in fact, in the 45 columns of dense text, that
16 thing that's so hard to read in this patent, the word
17 "playlist" doesn't occur even one time.

18 And more than that, he says, "I avoided it. I
19 didn't want to use the word 'playlist' because I'm not
20 talking about any generic playlist here."

21 We asked him, "Why didn't you use the term
22 'playlist'?"

23 And he said, "Well, that's a generic term.
24 That's a generic term. I was talking about something
25 very specific."

1 So, he purposely didn't use the word
2 "playlist." This patent is not the playlist patent.
3 We're going to talk about that one later, too.

4 So, we have to look at the claims as actually
5 defined; and we're going to spend a lot of time on this
6 so let me get into it.

7 Let me just address one more point here; and
8 that is Dr. Almeroth, he had a problem in this case. He
9 had a problem. The point is, as an expert, he wants to
10 be able to stand before you and show you that the
11 patentee actually had a product and actually made
12 something everybody could touch and feel and look at so
13 he could hold it up and use it as part of his testimony.
14 But he didn't have that here because remember what the
15 patent shows is just this figure with a computer. And he
16 didn't want to show you a computer. So, what did he do?

17 I understand he had a problem. But, ladies
18 and gentlemen, you can't just make things up; and that's
19 what he did. He said, "Well, I'm going to go ahead and
20 come up with this PDA. I'm going to make up this
21 device."

22 And if you remember, he had slide after slide
23 after slide where he walks through the invention using
24 this PDA; but it was made up. It was made up.

25 And, so, on cross-examination we asked him;

1 and sure enough he said -- you know, this doesn't
2 represent a particular PDA; and he said, "The second part
3 is true. This doesn't represent any actual PDA.

4 "Okay. So it's fictitious, right?

5 "That's correct."

6 That's correct. And, you know, I can give him
7 a break on trying to explain things because this is hard
8 to do and sometimes you have to use analogies; but it
9 sounded like he was suggesting this is actually what the
10 patent looked like.

11 But, ladies and gentlemen, that wasn't true
12 because in 1996 PDAs didn't have a hard drive. They had
13 no persistent memory that could store music. The only
14 memory they had, if you got the best one that was
15 available -- if you remember this testimony -- it could
16 store 3 and a half seconds of music in total. It would
17 take up the whole memory.

18 The one that people normally bought, sort of
19 the run-of-the-mill model, the Chevrolet, stored
20 0.7 seconds of music. 0.7 seconds of music.

21 Do any of you remember the old game show *Name*
22 *That Tune*? Even on *Name That Tune* you got more than
23 0.7 seconds. This is just not realistic.

24 And importantly here, ladies and gentlemen,
25 that iPod didn't have a headphone jack at all. At all.

1 There was no place to plug in headphones or a speaker or
2 anything else. How in the world could that be the player
3 that they say is covered by the patent? No music. No
4 sound comes out of it at all.

5 All right. So, let's get to infringement.
6 You'll remember this from my opening; and I just want to
7 review it briefly, that in order to show infringement,
8 every element of the claims has to be there. If you
9 can't decide that every element is there -- or said
10 differently, if you find that one of the elements is
11 missing, there is no infringement. That's the only point
12 of this slide. You don't have to miss all of them, don't
13 have to miss three. If you miss one, there can be no
14 infringement.

15 So, let's start with the biggest issue. And
16 Mr. Schutz put this back into his remarks; and I was kind
17 of curious about that, too. It's this algorithm for
18 skipping that we talked so much about in this case. And
19 the reason why we both focused on it so much is that this
20 is the limitation that appears in all of the claims, all
21 of the claims. So, if you find or you cannot conclude
22 that Apple is using this specific algorithm for skipping,
23 then there is no infringement of any of the claims in the
24 case.

25 I'm also going to talk about the algorithm for

1 repeating, which is one of the things Mr. Schutz touched
2 on. I'm going to go through these hardware differences I
3 told you about; and then we're going to talk about the
4 request to initiate transfer of a playlist, that doctrine
5 of equivalents issue that's in the case.

6 So, let's start with the algorithm for
7 skipping. As I said, ladies and gentlemen, this appears
8 in every asserted claim in the case; and it comes in
9 different forms. And you can go -- and if you look in
10 your jury notebooks, you'll find the construction, I
11 believe at the bottom of page 3. This is the one that I
12 had you circle. But there are also other forms of it as
13 you go through the jury notebook. You'll see this
14 algorithm used over and over and over again. And, so,
15 you'll see it in each one of the claims, again in
16 different forms; but it's in each and every one of them.

17 So, let's focus on the construction.
18 Remember, the judge told you when he just read his
19 instructions to you, that you have to use the definitions
20 that he gave you. You have to. That's what you have to
21 use to decide whether or not there is infringement in
22 this case.

23 And this particular one appears at the bottom
24 of the jury notebook at page 3, and this is the one that
25 I had you circle during the opening. And, so, what you

1 find at the bottom of page 3 -- it's just the top half of
2 this, and then the bottom half -- I'm sorry, at the
3 bottom of page 2; and then the rest of it appears at the
4 top of page 3.

5 So, when we look at this algorithm, you have
6 to ask yourself, "Well, what do we have to do? What is
7 it that the judge is talking about here?" And what he's
8 talking about here is that the meaning of this claim
9 element that appears in a whole bunch of those claims is
10 as set forth here. He gives you a definition; and he
11 says, "This is a means-plus-function limitation" -- we're
12 going to talk a little bit about those. And he says,
13 "The function is 'in response to a 'skip' command,'"
14 et cetera.

15 And what you're going to find out and what
16 you've heard is that for a means-plus-function
17 limitation, you've got to go find exactly that function.
18 You've got to find that function. And then once you find
19 that function, you have to find the structure, which in
20 software cases means the software that accomplishes that
21 function. You don't get to back up and say, "It's in
22 there." It's not pasta sauce. You don't get to say,
23 "Yeah, it's in there somewhere." You actually have to
24 pick it out. You have to identify the structure. And
25 then you have to ask yourself whether those two are

1 equivalent. And I've actually got those rules laid out
2 in a little more detail, but that's what has to happen.

3 So, the first thing you have to do is
4 understand what it is the judge has said is this
5 algorithm, what is this construction that we've got to go
6 looking for. And there are a couple of important parts
7 here. One is he tells us (reading) the structure
8 corresponding to the claimed function is as follows and
9 equivalents thereof.

10 And he says it's "a general purpose computer
11 programmed to perform the algorithm" --

12 Remember this is in your definitions. This is
13 the methods that are used to accomplish a software
14 function.

15 -- illustrated in this figure; and in
16 particular, Judge Clark points to a passage in the
17 patent, Column 34, line 28, to Column 35, line 48.

18 I'd like you to note that, ladies and
19 gentlemen. I'd like you to note that so that you can go
20 and look at it in the patent because you're going to see
21 exactly the algorithm that he has set forth here at those
22 lines.

23 But it's very important because that part of
24 the construction -- that part of the specification gives
25 you a little more information about it. It's not just

1 the steps. It's important that you address the entirety
2 of that algorithm. You've got to look at it as a whole.
3 You can't look at just one part or another part. You've
4 got to look at that as a whole.

5 So, when we look at that -- let's first remind
6 ourselves of what we're talking about here. Do you
7 remember Mr. Call's testimony? Remember Mr. Call's
8 testimony? Well, he talked about this skipping. That's
9 what we're doing, the method that this patent uses for
10 skipping.

11 And the method this patent uses is -- if we go
12 back, we can see. We've got to scan forward in something
13 called a "sequencing file" to locate the next
14 Selection_Record of the appropriate LocType. Now,
15 Mr. Call told us what that was. He said, you know, these
16 (indicating) are Selection_Records. This whole thing is
17 a sequencing file. And when you scan forward, he was
18 talking about a subject, a subject LocType. You look for
19 the next matching code.

20 That's how the patent skips. It doesn't just
21 go to the next one. It doesn't just go in order, one
22 after the next. It scans through the file to look for
23 the next appropriate LocType, just like the court says.
24 It scans forward looking for the next Selection_Record of
25 the appropriate LocType.

1 When it finds that, it resets something called
2 the "CurrentPlay variable" to that record number. So, it
3 doesn't just look for it. When it gets there, it goes
4 ahead and puts that into the CurrentPlay variable.

5 And then it goes out and fetches something
6 corresponding to that CurrentPlay variable. It fetches
7 this new program segment that's actually identified in
8 that Selection_Record.

9 It's complicated. I admit that's complicated,
10 but that's what they patented. That's what we're looking
11 for here.

12 So, Mr. Call again, he reminds us that when
13 you press that "skip" button, you have to start scanning
14 through the file until you find the next appropriate
15 LocType; and then you do those other things. You go out
16 and you fetch the file. You reset the CurrentPlay
17 variable. You have to do all those steps.

18 And remember the court just told you you can't
19 deconstruct this. You've got to look at it as a whole.
20 You can't just find one little piece and throw up your
21 hands. You've got to look at it as a whole.

22 When we look at the specification, we look at
23 the patent -- remember that column and line number that I
24 read to you a few moments ago? This is what you find
25 when you go look for it. So, Column 34, lines 32 through

1 36, and 32, lines 1 through 9, this is what you see.

2 They're telling us what that LocType is, and it's a
3 character and an integer -- my apologies.

4 They actually tell us what those codes are,
5 And they tell us how they're used. They say, look, the
6 Selection_Record is identified by the LocType S and a
7 location field. Remember, that was the example that
8 Mr. Call took you through, too. That's ^ subject. You
9 look for that LocType.

10 But this is a part of the specification that
11 Mr. Schutz didn't pause on at all; and it's important
12 here, ladies and gentlemen. It's right in the middle of
13 that passage that Judge Clark said that you should look
14 at, and it tells you why you're doing this. It explains
15 the algorithm in a way that makes you understand what
16 this is really all about. And it says that you skip to
17 the next subject, which is accomplished by scanning the
18 selection file until the next subject Selection_Record is
19 located. So, you do exactly what it says; and that
20 causes the intervening material to be skipped. You can
21 jump over things. You're not just going to the next one.
22 You can jump over whatever happened to be in the middle
23 there.

24 So, you can see in Mr. Call's example that
25 when they go scanning for the next Selection_Record with

1 an S, you've skipped a whole bunch of those entries.
2 That's what we're talking about here. We're not talking
3 about just moving to the next one or moving to the one
4 before. This specific method is more powerful. It's
5 more powerful. It's got the ability to do these things,
6 And that's what we have to be looking for. That's the
7 algorithm as a whole. That's what the court's
8 construction really talks to.

9 So, what did Dr. Almeroth do? Well,
10 Dr. Almeroth knows that he can't show you that algorithm.
11 He can't. It's not there; so, he can't take that
12 specific set of steps and then show you where to find it
13 because it's just not there.

14 So, he does a couple of things. He said
15 first, just ignore it. You don't need it. You don't
16 need it because in the iPod they're all the same. You
17 know, you're just going from one to the next. So, who
18 cares that you -- you know, the fact that you can't scan
19 forward, it doesn't make any difference.

20 And the illustration of this -- I have to take
21 my friend Mr. Schutz to task for this.

22 Could I have the Elmo, please?

23 This is what he showed you. I don't have his
24 slides from this morning but this is what he showed you a
25 few minutes ago and he said, "Look, this is really what's

1 going on here. This is going on here."

2 Now, ladies and gentlemen, again, I'm not
3 complaining about somebody using analogies. I use them,
4 too. You have to. This is hard stuff. But this is kind
5 of made to look like a figure in the patent. I mean,
6 they use the same font that the patent does; and they
7 make it look like Figure 5. Well, that's not Figure 5.
8 Figure 5 doesn't look anything like this. Figure 5 has
9 all those different kinds of LocTypes in it; and when you
10 scan forward, you skip over the intervening material.
11 This is a little out of balance, just a little out of
12 balance, because the reality is, ladies and gentlemen,
13 you do have to have the algorithm.

14 Dr. Almeroth is not right. Just because Apple
15 doesn't use it doesn't make it useless. Just because
16 Apple doesn't use it doesn't mean that you can ignore it.

17 So, if I can go back to the slides.

18 The fact is that what he says is, "Look, Apple
19 doesn't have this. They don't have this physical
20 manifestation of a LocType; so, there's nothing for you
21 to be able to go and look for." He says, "You don't need
22 to because the next thing is always a song; so, you don't
23 need to know what kind of program it is. You don't need
24 a type code of any kind." He says you have to have a
25 concept of a LocType but you don't really have to use it.

1 You never have to go looking for it.

2 But, ladies and gentlemen, that's not what the
3 claim says; and that's not what the law says. The law
4 says if they're going to stand here and accuse Apple of
5 using their method, they've got to prove to you that
6 Apple actually uses it.

7 Now let's talk a little bit about
8 means-plus-function because Dr. Almeroth's other argument
9 is, "Well, you know, if they're doing it, it's in there
10 somewhere; but I'm just not going to tell you exactly
11 where it is." But you can't do that. You can't do that
12 under the law.

13 So, under the law what you have to do is
14 something very particular. This is
15 means-plus-function -- this is the law of
16 means-plus-function infringement, and Judge Clark just
17 explained this to you.

18 The first thing you have to do -- and this is
19 at page 18 of your instructions. He says you must
20 identify a structure in the accused device, here in the
21 iPod, that does the claimed function. You have to do
22 that.

23 Number 2, you have to compare that structure
24 to what Judge Clark has said is in the patent, that
25 algorithm that we just went through.

1 Number 3, you've got to determine whether
2 those two are the same or not, whether they're an
3 equivalent. And the law says he -- Judge Clark gives you
4 a couple of different methods. He says you can look at
5 it to see if they do the substantially -- they do the
6 same thing in substantially the same way to achieve the
7 substantially same result. It's kind of a mouthful, but
8 that's what he has in the instructions. That's at
9 page 19.

10 And then importantly he says for
11 means-plus-function you have to rely on technology that
12 existed as of the date of the patent, March, 2001. So,
13 remember that. We're talking about the date of the
14 patent.

15 So, the fact of the matter is, ladies and
16 gentlemen -- is Dr. Almeroth simply just didn't do this.
17 He never put up the claim construction, Never put up the
18 structure in the patent side-by-side with something from
19 Apple's software and said, "Look, let me explain to you
20 why they're the same." He just didn't do that. He just
21 didn't do that.

22 I could tell you, "Look, two of my kids are
23 substantially similar"; and you could believe me or not,
24 I suppose. But that doesn't let you evaluate my opinion.

25 On the other hand, if I were to say, "Look,

1 two of my kids -- you know, they both like watermelon.
2 They both play soccer. They're both really loud. They
3 both, you know, like *SpongeBob*," that would help. But
4 then if I also told you that one of them is a 17-year-old
5 girl and the other is a 4-year-old boy, you might wonder
6 why my 17-year-old is watching *SpongeBob*; but the reality
7 is you could start to evaluate whether what I'm saying is
8 true or not.

9 The same thing is true in the law. The same
10 thing is true in the law. What the law says is that
11 experts like Dr. Almeroth and even Dr. Wicker -- I'll say
12 this about my own expert. They can't just come before
13 you and say, "Look, these things are substantially
14 similar. They're equivalent. I'm going to sit down
15 now." They've got to tell you exactly why. They've got
16 to show you that comparison. They've got to put up that
17 claim language, that claim element that's been construed.
18 They've got to put up the Apple software, and they've got
19 to show you what's similar and what's different. And
20 Dr. Almeroth didn't even try. He didn't even try.

21 So, ladies and gentlemen, I don't think there
22 is any evidence you can rely on here. He just didn't
23 give you anything, despite the 900 hours of work. And
24 Mr. Schutz took my witnesses to task for how much money
25 they've gotten; but I think Dr. Almeroth's the winner.

1 You know, I think that four-fifty is the biggest number
2 we've heard.

3 But I'm not holding -- I'm not criticizing him
4 for that because I understand he's an expert and people
5 get paid for their time. But he's got to do his job.
6 He's got to show you that side-by-side comparison. Where
7 is it?

8 Mr. Schutz used a word, "montage." I had to
9 lean over and ask somebody what that meant. He said,
10 "Dr. Almeroth used this montage of evidence." A montage
11 is not going to do it. You've got to have a comparison.
12 You've got to show us where that claim structure is so
13 that you can evaluate whether or not there is
14 equivalents.

15 He never talks about that algorithm. He never
16 tells us anything about the similarities in way or
17 similarities in result, what the law says he's supposed
18 to do that would have been one of his choices. He could
19 have talked about the insubstantiality of the differences
20 if he had wanted to, but he didn't do that. He never
21 told you what was different or what was similar.

22 He says it's metaphysical and he says that
23 concept is in there somewhere, but that's not the same
24 thing. Again, this isn't pasta sauce. He can't just say
25 it's in there and walk away. He's got to tell you why,

1 and he's got to convince you that those similarities are
2 so strong that you can conclude that they're an
3 equivalent.

4 The reality is, ladies and gentlemen, the
5 evidence in this case showed that Apple uses a
6 substantially different way, that it's impossible to skip
7 over songs, that you simply go from one song to the next.
8 So, I mean, we have a collection of songs here. And the
9 fact of the matter is you're going to listen to "Leavin'
10 on Your Mind" by Patsy Cline and then "Blue Suede Shoes"
11 by Elvis and then we have -- the third one is actually a
12 book. You're going to have to listen to *The Rainmaker* if
13 you're going in order. If you're just pressing that
14 "skip" button, that's what you get. That's just the way
15 it works.

16 One thing I should pause on quickly here is
17 just to comment on the fact that this playlist, if it
18 exists at all on the Apple device, it exists in memory.
19 I'm going to come back to that, but I want to just note
20 it here because you heard a lot of testimony about that.
21 It doesn't exist on the hard drive -- I'm sorry -- the
22 Dulcimer database is on the hard drive; but when it gets
23 in memory, it's just bits and pieces. That file is
24 different when it gets there.

25 We heard from Mr. Boettcher that, in fact --

1 he took us through the code. You remember how exciting
2 that was. I know that was everybody's favorite part of
3 the case. But he stepped us through and he sat there on
4 the stand and he was ready to be asked any question they
5 wanted to ask him. So, if Dr. Almeroth couldn't find
6 something, they could have certainly asked Mr. Boettcher.
7 And they deposed him earlier in this case. They could
8 have asked him then as well.

9 And he showed us that code, that
10 getNextPlaylistTrack code. And I asked him point-blank
11 does the iPod have any way for you to skip over songs,
12 and he said no. He said no.

13 And, ladies and gentlemen, that turns out to
14 be a substantially different result. So, you can't skip
15 over the songs the way that Mr. Call described with
16 respect to this patent. You don't have that ability to
17 scan forward and load a new code in when you get to the
18 one that you -- the LocType or the other code that you
19 find that's similar. You've got to go one after the
20 next, after the next.

21 And, ladies and gentlemen, just on this point,
22 let me just say one thing. Mr. Schutz said that somehow
23 Dr. Wicker had endorsed this summary that Dr. Almeroth
24 had put together, the 771A. I'm not sure how useful
25 those things are; but in no, way, shape, or form did

1 Dr. Wicker say that that analysis was correct. What he
2 said was, "I don't know that we have a disagreement about
3 the way the software works."

4 But remember it was Dr. Wicker's opinion that
5 these were substantially different, substantially
6 different. So, if Mr. Schutz will agree that the experts
7 are of one mind, then we ought to win this case pretty
8 easily, pretty easily. But I don't want you to be misled
9 by this 771A business.

10 Okay. Let me offer one more point about why
11 these are substantially different, and this again comes
12 from Mr. Goessling. So, remember, this is that third
13 inventor that didn't testify in this case live but we had
14 him by depo. Look at what he said about whether it's a
15 difference to have to go through one after the next,
16 after the next the way Apple does it versus the scanning
17 forward to the next appropriate LocType, the way the
18 patent does it.

19 And he says, well, you know -- he was asked
20 (reading) but I'm trying to understand how that differs
21 from the just "skip to the next track" button on a CD
22 player. And that one goes one to the next, to the next.

23 And he says, "Well, if you did what you
24 described with the one-level controller" -- and that's
25 the CD player -- "and with what we wanted to do, you'd

1 have an article with, you know, 50 tracks. You'd have to
2 do 50 little jumps because it wouldn't know anything
3 about the hierarchy, where we might be able to do it in
4 two jumps because you'd skip all the detail and get to a
5 different topic."

6 So, what does that mean? That if you use his
7 invention, you can just skip through 50 in just two
8 jumps. Just two jumps. But if you're going to use the
9 50 little jumps approach, that's not convenient. It's a
10 different result.

11 And, ladies and gentlemen, that's real
12 evidence. That's the kind of thing that you can use to
13 conclude that the method for skipping that Apple uses is
14 different from that algorithm that Judge Clark said the
15 claims use.

16 All right. Let me get to the algorithm for
17 repeating. This is also in "means for" format; and it
18 appears in these two claims, claim 1 of the '076 patent
19 and claim 1 of the '178 patent. This is the construction
20 and Mr. Schutz didn't really show you this, but I'll
21 dwell on it for just a moment because the key here is
22 this final part of the limitation. You've got to have
23 the whole algorithm. I'm not walking away from that.
24 But the idea is that you repeat the steps until the last
25 Selection_Record is reached, and that has to reset the

1 CurrentPlay variable to 1. So, you have to get to a
2 Selection_Record that tells you to go back to the
3 beginning. That's sort of a way to summarize it.

4 Mr. Call explained this; and he said, well,
5 what we're talking about here -- I'm sorry. Let me start
6 with the patent again. This is the passage that the
7 court refers you to in that claim construction. And
8 Mr. Schutz said the R record doesn't appear anywhere in
9 the claim construction. That's not right. That's not
10 right, because the court says, "Go look at this passage."
11 And when you go look at this passage you see that R
12 Selection_Record. It's right in there. He can argue
13 equivalents. He can argue that you can use other codes
14 or something else like that, but he can't run away from
15 the construction. That's what the construction is.

16 And we see that in Figure 5, that when you get
17 to the end of the file, there is an R; and that tells the
18 computer you've got to go back to the beginning. And
19 Mr. Call confirmed that. He talked about the R; and he
20 said, when you get to the R -- "Okay. And it did that by
21 getting to the R record and the R record indicated that
22 you should interpret the integer to be 'go to the first
23 record in the selections table --'"

24 "Answer: Right."

25 So, when you get to that R record, a

1 Selection_Record with an R, you've got to go back to the
2 beginning.

3 What's the evidence show? The evidence
4 doesn't show anything like that. Mr. Boettcher said
5 there is a flag that you set in the settings application.
6 It's not in the playlist, which is what they say is the
7 sequence file or the Selection_Records. There is nothing
8 in the Selection_Records that do this. He said it's a
9 separate part of the iPod that you deal with, that the
10 user has to go in and set this flag.

11 Dr. Wicker confirms this and he said, "Look,
12 the Selection_Record is simply not there." The Apple
13 products don't have this sequence file with a
14 Selection_Record. They just use a different mechanism.

15 But again, ladies and gentlemen, where from
16 Dr. Almeroth is that side-by-side comparison? Where does
17 he take the construction the judge gave us and compare it
18 to some code in the Apple devices? It's just missing.
19 So, again, you can't make your equivalents determination.
20 He didn't even try.

21 So, I'm going to mark that one off as well.

22 Now let me go through the important hardware
23 differences here. And I am running a little low on time;
24 so, I'll speed it up. So, there were a number of
25 hardware things that we talked about in this case; and

1 these are all means for limitations. So, that same
2 equivalents analysis has to obtain.

3 We start with the means for -- you've seen
4 these. These are the rules for equivalents. You've got
5 to identify the structure, and then you've got to compare
6 them and make an equivalents determination. So, let's do
7 that with each of them.

8 We start with the means for reproducing, and
9 that's a sound card versus a codec. And this is in
10 claims 1 and 14 of the '076 and claim 1 of the '178.

11 Now, this one Dr. Almeroth actually did the
12 comparison on. So, he knows how to do this. He knows
13 how to do this. He said, "Look, you've got a sound card.
14 That's what the court's claim construction talks about.
15 And in the Apple devices there is a codec chip." And he
16 said, "I'm going to compare those two things." So, he
17 did the first part of the means-plus-function analysis
18 correctly.

19 The problem is, ladies and gentlemen -- is
20 this really believable? He said, "Look, a sound card,
21 which is this big card with lots of chips on it and lots
22 of interfaces, is the same thing as just one little
23 chip." That's like saying that, you know, one piece of
24 furniture is the same as your whole house. You know, the
25 furniture is inside the house; but it's not the same

1 thing.

2 DEPUTY CLERK: Mr. Cordell, you have ten
3 minutes.

4 MR. CORDELL: And the sound cards are built
5 for computers, not for embedded music products; and that
6 means that it was just built for a different purpose. We
7 got that from Mr. Fadell.

8 Remember that timing is important. You've got
9 to make this determination in March, 2001.

10 I'd just like to point out quickly that there
11 are interfaces on the sound card. You could plug
12 headphones into that sound card. You can't do that with
13 a chip. None whatsoever.

14 This means for receiving, ladies and
15 gentlemen, we had a lot of discussion about that; and
16 this has to do with an infrared link for downloading from
17 the Internet.

18 And you heard a lot of evidence about whether
19 IrDA is the same as FireWire. Notice this, ladies and
20 gentlemen. You're talking about a one-hundredfold
21 difference between the speeds of those two things.
22 One-hundredfold.

23 Mr. Schutz said, "Look at Apple's patents.
24 Apple's patents talk about those two issues." Well,
25 ladies and gentlemen, look at those patents. They're the

1 wrong dates. They're the wrong dates. They're too late.
2 Remember, March, 2001, is the date you've got to use.
3 March, 2001, is the date you've got to use.

4 And the fact of the matter is it's undisputed
5 that if you took eight minutes to download music using
6 FireWire, it would take you 800 minutes with IrDA. It's
7 just not practical; and, so, it's not an equivalent at
8 the end of the day.

9 You can also consider patents. The judge said
10 you can consider patents. It's not dispositive; but if
11 Apple gets a patent, that means the two things are
12 different. Well, ladies and gentlemen, there are 25
13 patents on this FireWire technology.

14 There is also this business about contact with
15 the Internet. The evidence shows that an *iTunes* computer
16 could be set up completely with your own CDs. It never
17 has to go to the Internet. So, they never actually
18 offered you any evidence that these things go out to the
19 Internet. That's another problem they've got.

20 The means for accepting, the keyboard versus a
21 quick wheel, ladies and gentlemen, I'm going to leave
22 that one to you because I just think that you can decide
23 whether a keyboard is the same thing as three buttons on
24 an accelerator wheel. That's not a keyboard.

25 And remember Apple has got its own patent for

1 this, and they don't give you a patent unless it's
2 different. And you can use the fact that it's been
3 patented as evidence of the differences, that there is no
4 equivalents, that these two are not the same.

5 And the means for storing, ladies and
6 gentlemen, it's just one issue; and that is, remember the
7 time here. It is March, 2001. And in March, 2001, you
8 couldn't say these were the same. The chips would cost
9 over \$3,000. The hard drive was 200. That's a
10 substantial difference.

11 Let me get to validity quickly, ladies and
12 gentlemen, because I'm -- actually, I've got to do the
13 request to initiate.

14 This is the doctrine of equivalents issue
15 where -- remember the issue here is which part of the
16 system requests the transfer and this is the court's
17 actual construction. The court's actual construction was
18 that the player has to request the transfer; and that's
19 what we see up on the screen, that the player makes the
20 request.

21 But Dr. Almeroth said, "Look, this is a USB
22 device; and in the USB device, it's not the player. It's
23 the host that initiates all transfers. So, it's exactly
24 backwards."

25 And, in fact, he even admitted it's the

1 computer that does it. It's exactly backward.

2 These are USB devices, ladies and gentlemen.
3 He said they all work the same. Well, ask yourself.
4 What is a mouse requesting from a computer? What kind of
5 a request is the mouse sending out? Because he said they
6 all work the same.

7 The fact of the matter is he never showed you
8 that comparison. He never showed you why they were the
9 same or different, and he can't make out equivalents on
10 that case.

11 The evidence was undisputed that the iPod
12 never makes a request of any kind. And Dr. Wicker tells
13 you that doing it exactly backwards, that's a substantial
14 difference.

15 Validity, ladies and gentlemen, I'm going to
16 have to go through quickly. I apologize. But you heard
17 the evidence. You saw Mr. Novacek. And, yes, he was
18 paid for his time. He's a consultant here. He's a
19 consultant. But you saw the system. You saw him take
20 you through it step by step by step, through every step
21 of those claims.

22 Mr. Schutz says there's no source code. He
23 should know better than that, ladies and gentlemen,
24 because he knows that the source code that they were
25 talking about is different from what was running on the

1 machine in front of you, that that machine in front of
2 you, the source code was not available. So, he shouldn't
3 suggest to you that somehow that source code was
4 someplace and nobody looked at it. That's just not true.

5 But the reality is you saw Mr. Novacek and you
6 saw him take you through those one at a time and he took
7 you through every element of the claims.

8 We had a lot of discussion about the
9 downloading and whether or not DAD could download, and
10 you all saw it. You saw the little red light flashing as
11 it was downloading the files. So, ladies and gentlemen,
12 the reality is you heard the evidence. You saw it, and
13 I'll leave it to you to determine whether or not these
14 patents remain valid.

15 One last point on DAD. The Patent Office
16 didn't consider this; so, this wasn't prior art that was
17 put in front of the examiner. They didn't have the DAD
18 system. They didn't have that full DAD manual. And, so,
19 that's information -- remember the instructions say you
20 can give that a little extra weight because the Patent
21 Office didn't get to see it.

22 Sound Blaster is another piece of the prior
23 art. It shows you unequivocally that playlists were in
24 the prior art. It's simply incorrect to suggest that
25 they weren't.

1 Let me get to damages in the last few minutes
2 that I have. Remember Mr. Logan's testimony about the
3 fact that the Patent Office can make mistakes. He's
4 right about that.

5 Let's talk about damages. Let me say
6 absolutely positively we believe no damages are due.
7 That's an absolute.

8 But remember what we're doing. We're
9 pretending we're at that negotiation between the two
10 parties, and they're having to discuss what might be due.
11 The first thing you take off the table is anything that
12 has nothing to do with the patent, the contributions that
13 Apple made. They don't get money for that. You can't
14 reap where you didn't sew. So, they don't get money for
15 what Apple came up with. They don't get money for what
16 other people came up with, the playlists that were in
17 Sound Blaster or the downloading that DAD showed you.

18 The reality is that iPod sales are driven by
19 all kinds of things that have nothing to do with these
20 patents. So, when they are asking you for a per-unit
21 royalty, that doesn't make sense. They shouldn't make
22 money because Apple is doing all these things and
23 reducing the prices and otherwise making the products
24 better.

25 We don't have an established royalty in this

1 case. Despite the eight years that went by, they can't
2 show you a license that happened in here or products that
3 were sold. So, when we're looking for capability, the
4 Kelley Blue Book or comparability for real estate, we
5 don't have them.

6 Mr. Schutz doesn't like my licenses. He
7 doesn't like the E-Data license or the Digeo license; but
8 he didn't show you any, not a single one, not one single
9 comparable license. So, he may not like mine but that's
10 the evidence we have, ladies and gentlemen, and he didn't
11 come up with anything else.

12 Let me pause briefly on the playlist patent.
13 I think this is a compelling piece of damages evidence.
14 They got up in an auction, a free-market auction, and
15 sold this patent for \$400,000. \$400,000. And you can
16 consider that.

17 The Concert Technology business, they tried to
18 minimize it. They said that wasn't any big deal.
19 Remember all the communications back and forth between
20 Mr. Logan and Mr. Farrelly and the other people at
21 Concert. They had extensive discussions leading up to an
22 offer by Concert in the low millions and an offer by
23 Mr. Logan to sell for 5 million, all of the patents.

24 The reality is, ladies and gentlemen, that
25 their demand is off the chart. \$84 million is so much

1 bigger than any of the other numbers that were in the
2 marketplace, it simply makes no sense.

3 Mr. Nawrocki included things in his
4 allocation -- It was a blur of evidence that he put up,
5 but he included things in his allocation that are not
6 proper. He included playlists from *iTunes*, and the judge
7 just told you that's not proper. You can't do that. You
8 have to disregard evidence of damages based on *iTunes*.
9 And Mr. Nawrocki did that. It's in his testimony.

10 He said, in fact, that --

11 "You count those twice?

12 "Yes.

13 "One on *iTunes* and one on the iPod?

14 "That's correct."

15 He included things within *iTunes* in this
16 25 percent allocation he did up here. He's taking
17 damages on *iTunes*. He can't do that.

18 So, with that, ladies and gentlemen, let me
19 just pause briefly about the verdict form. We want you
20 to answer "no" on infringement. I don't have time to go
21 through it on the Elmo. We want you to say "no" to every
22 question on infringement. Remember, you only heard
23 evidence about one claim. One claim. So, you could
24 decide, if you thought that evidence was sufficient, all
25 of the other claims were not infringed because they just

1 didn't prove them. They just didn't prove them.

2 We want you to answer "yes" on all of the
3 validity questions.

4 And then as to damages, you could put
5 \$5 million in the lump-sum blank. That's what we think
6 is appropriate here. You heard all of this evidence
7 about a lump sum, and we think that's appropriate.

8 However, if you don't think 5 million is the
9 right number, that's okay. Like Mr. Schutz, you can put
10 whatever number you want in there. You might decide
11 that, in fact -- and I apologize. Remember
12 Mr. Nawrocki's opinion? I've got to comment about that.
13 He said for one patent -- for two patents it's 90 cents.
14 For one patent it's \$1.30. I guess if he was selling
15 apples, you'd get 90 cents for two apples, a
16 dollar-thirty for one apple; and if there's no apples, it
17 would be \$2. And that doesn't make sense, and you can
18 take that into account.

19 But remember all of the factors that they had
20 at the negotiation. Remember the fact that they had the
21 playlist patent for \$400,000. Both sides knew that.
22 They knew that Mr. Logan had offered to sell the patents
23 for 5 million. There were comparable agreements of five
24 hundred and seven-fifty. Nobody knew if the product was
25 going to sell. And remember that Apple was just renting

1 here. They weren't buying. They weren't getting these
2 patents. They weren't getting the patents the way they
3 were for four hundred here or 5 million. So, you can
4 decide that it would be reasonable that 400,000 is a
5 right number or perhaps five hundred or seven-fifty or
6 \$5 million. I'll leave that to your judgment. But one
7 thing that's clear is that \$84 million is just way off
8 the charts.

9 And with that, ladies and gentlemen, I think
10 I've exhausted my time. I won't argue the verdict form.
11 I just want to remind you again of the way those
12 witnesses treated that product, the way they looked at
13 this iPod and the way they told you about how they hoped
14 some day to tell both their kids and their grandkids that
15 they had a part in bringing this into all of our lives.
16 And with that, I ask you to -- again I thank you for your
17 time and patience and appreciate a fair verdict. Thank
18 you.

19 THE COURT: All right. Mr. Schutz.

20 MR. SCHUTZ: Thank you, your Honor.

21 Ladies and gentlemen, I just have a few
22 moments; and I guess I did forget to introduce myself. I
23 have been married for 34 years, and I have 3 kids. I may
24 win the longest marriage contest, although I can't
25 remember how long Larry has been married.

1 I grew up on a farm in southern Minnesota.
2 I'm not from Texas. I have a daughter that lives here
3 but -- and I was the first one in my family to go to
4 college. But despite my having gone to college and where
5 I grew up, the smartest, smartest person I ever met,
6 smartest person I know today, is my mom. And my mom
7 always says to me, "Ron, you can listen to what people
8 say; but watch what they do." All right? And her
9 advice, I think, is well put when --

10 THE COURT: Can we change the control on
11 the --

12 DEPUTY CLERK: I'm sorry.

13 MR. SCHUTZ: And, so, I'd like to put
14 something up here. This is on the skip forward, the
15 LocType issue. And this is the algorithm, and I believe
16 that Mr. Cordell said that they don't skip over anything.
17 Okay? And if my mom would have heard that, she'd have
18 said, "Ron, he said it doesn't skip over. Is that
19 required?"

20 I'd say, "Well, let's take a look. Let me
21 see. You scan forward. You reset. You fetch. Nothing
22 about skipping over."

23 And then my mom might say, "Well, what about
24 this appropriate LocType?"

25 And I'd say, "Well, mom, the LocTypes can all

1 be the same kind. There's been testimony that they can
2 all be songs." Okay? You don't have to have songs and
3 different things, and that was the purpose -- I made it
4 very clear that that little chart I put in there was not
5 from Figure 5, but it was based on Figure 5 because the
6 expert said it could all be a single LocType.

7 And I can't find an R in there, either, that
8 you've got to have this R.

9 Then on the software, well, there was this
10 statement made that Dr. Almeroth never, you know, showed
11 the claim limitation and where it's found in the
12 software. We spent a ton of time on this chart. We had
13 it up there a long time. That's the claim language and
14 the court's definition. Dr. Almeroth talked about this,
15 that they all have it.

16 And then I showed it to you -- went into the
17 actual source code and Dr. Almeroth did all those things
18 to show you that, in fact, it looks, scans ahead,
19 fetches, goes to the next Selection_Record, just exactly
20 the way the claims say it has to be done.

21 DEPUTY CLERK: Mr. Schutz, you have four
22 minutes.

23 MR. SCHUTZ: Thank you.

24 Ladies and gentlemen, you know, I also -- I
25 got my start as a lawyer in the Army and I was a

1 prosecutor in the Army with the 7th Infantry division and
2 when I was a prosecutor, it was a typical defense tactic
3 to try the victim, to try the victim. And that happened
4 here, too. The first chance, the first chance that an
5 Apple lawyer had to talk to Mr. Logan, he accused him of
6 being a tax cheat. And then, of course, starts out the
7 argument saying, "You know, I'm not going to mention that
8 there is a pink elephant in the room. Don't think about
9 a pink elephant. Let me just call Mr. Logan a tax cheat
10 again."

11 Well, as we know, what happened -- and
12 Apple -- this is one of the most powerful, richest
13 corporations in the world -- accused Mr. Logan of being a
14 tax cheat, when what happened was Mr. Logan's company
15 failed to file a form that says they don't owe any taxes.
16 And overnight, overnight we were able to get that fixed,
17 put in evidence the certificate that said, "You don't owe
18 any taxes. Everything is fine." I thought that was the
19 end of it.

20 I've got to tell you, I was a little
21 flabbergasted to see him come in again and say, you know,
22 "I'm just not going to talk about the fact that Mr. Logan
23 cheated on his taxes." Excuse me? But, you know, I saw
24 that repeatedly when I was prosecuting criminals in the
25 Army. It was blame the victim, and that's what -- that's

1 exactly how they started the case here.

2 One final thing, ladies and gentlemen, on the
3 iPod. It's a great product. I own a couple of them.
4 I've bought them for my kid. We're not saying the iPod
5 isn't a great product. All we're saying is, "Look, some
6 of what's in that iPod, we actually came up with that
7 first"; and the law says you don't have to copy. We
8 don't have to prove they stole it. We went to the Patent
9 Office first, way before anybody else and we got a piece
10 of the technology here and we should be compensated for
11 it and we should get some piece every time they sell one.
12 That would be fair. That would be the fair thing to do.
13 And Apple doesn't want us to do that.

14 Let there be no doubt, ladies and gentlemen,
15 what they want you to do is they want you to kill these
16 patents. They want you to take these patents; and they
17 want you to toss them in the wastebasket and say, "We'll
18 kill them even though we didn't look at any prior art,
19 even though the burden is by clear and convincing
20 evidence."

21 They want you to -- if you don't kill the
22 patents, they want you to award a lump-sum amount so that
23 there's no sharing in the success of the product even
24 though not a single Apple employee came in here and said,
25 "We don't need it. Thank you very much. We'll give you

1 a lump sum for what you did. We're going to do something
2 different in the future. We're going to take it off. We
3 don't need it. We're not willing to give you any credit,
4 any credit for the next million, 2 million, or 100
5 million units we sell, none, zippo, nada, even though we
6 won't take it off.

7 I think I'm out of time. You guys have been
8 sitting there for a long time. Again, there are very few
9 things that Mr. Cordell and I agree on. Okay? But one
10 thing we both agree on is that it's very important what
11 you do and we thank you very much for your service.

12 Thank you very much.

13 THE COURT: All right. Ladies and gentlemen,
14 this will be very brief. It is your sworn duty as jurors
15 to discuss the case with one another in an effort to
16 reach agreement if you can do so. I remind you of my
17 instruction on page 2. Answer each question based on the
18 facts as you find them. Do not decide who you think
19 should win and then answer the questions accordingly.
20 You need to go through these forms and answer the
21 questions based on the facts.

22 Each of you must decide the case for yourself,
23 but only after full consideration of the evidence with
24 other members of the jury. While you are discussing the
25 case, do not hesitate to reexamine your own opinion and

1 change your mind if you become convinced that you are
2 wrong. However, don't give up your honest beliefs solely
3 because others think differently or merely to finish the
4 case.

5 Remember that in a very real way, you are the
6 judges. You are the judges of the facts.

7 Don't let bias, prejudice, or sympathy play
8 any part in your deliberations. This case should be
9 considered and decided by you as an action between
10 persons of equal standing in the community, of equal
11 worth, and holding the same or similar station in life.

12 A corporation is entitled to the same fair
13 trial at your hands as a private individual and should be
14 treated as such. The law is no respecter of persons; all
15 persons, including corporations and other organizations,
16 stand equal before the law and are to be dealt with as
17 equals in a court of justice.

18 When you retire to the jury room to deliberate
19 on your verdict, you will take the charge with you as
20 well as the exhibits the court has admitted into
21 evidence. When you go to the jury room, the first thing
22 you should do is select one of your number as foreperson
23 who will help guide your deliberations and will speak for
24 you in the courtroom. The foreperson should read or have
25 another juror read the instructions to the jury, and you

1 should then begin your deliberations.

2 If you recess during your deliberations,
3 follow all of the instructions I've given you on your
4 conduct during the trial. Don't discuss the case unless
5 all jurors are present in the jury room. So, if there is
6 some kind of a break, wait until everybody is back before
7 you discuss.

8 After you have reached your unanimous verdict,
9 your foreperson should fill in your answers on the
10 original written question form, that verdict form I
11 showed you a copy of, and initial and date that verdict
12 form. Do not reveal your answers until such time as you
13 are discharged unless otherwise directed by me.

14 You must never disclose to anyone, not even to
15 me, your numerical division on any question. Now, if you
16 want to communicate with me at any time, give a note, a
17 written message or question to the court security officer
18 who will be outside the door. He'll bring it to me.
19 I'll respond as promptly as possible, either in writing
20 or by having you brought back into the courtroom so I can
21 address you orally.

22 The presiding juror or any other juror who
23 observes a violation of the court's instructions shall
24 immediately warn the one who is violating the same and
25 caution the juror not to do so again.

1 Now, after you've reached a verdict, you are
2 not required to talk with anybody about the case unless
3 the court orders otherwise. You may now retire to the
4 jury room to conduct your deliberations.

5 Ms. Mullendore will go ahead and give you the
6 additions so that you can each have your own copy. You
7 can leave at this time.

8 (The jury exits the courtroom, 11:36 a.m.)

9 THE COURT: Okay. We need a break.

10 MR. CORDELL: I apologize about that, your
11 Honor.

12 THE COURT: No. That worked out just fine,
13 too. I was just trying to give each of you a break if
14 you needed it, but it worked out.

15 I think the smart thing to do, the way we are
16 now, is just go ahead and break for lunch and then come
17 back and start with the evidence on *laches* and
18 inequitable conduct. So, what I'm going to do is we're
19 going to recess; and I'll ask you to be back here at 1:00
20 for us to get started. Okay? Is there anything --

21 MR. CORDELL: No, your Honor. Thank you.

22 THE COURT: All right. In that case we'll be
23 in recess until 1:00.

24 I do need somebody -- some unfortunate person
25 to remain around the courtroom in case a message comes

1 back because if a note comes from the jury, I'm going to
2 be in chambers and we'll just deal with it right on the
3 spot.

4 MR. CORDELL: We will, your Honor.

5 (Recess, 11:37 a.m. to 1:02 p.m.)

6 (Open court, all parties present, jury not
7 present.)

8 THE COURT: Okay. I think we're now ready for
9 the bench portion on inequitable conduct and *laches*. I
10 guess the burden is on Apple on these; so, who do you
11 want to call first?

12 MR. STEPHENS: Your Honor, Apple calls
13 Mr. Charles Call.

14 THE COURT: Okay.

15 You remember, sir, that you're still under
16 oath?

17 THE WITNESS: I do.

18 THE COURT: All right. Please be seated.

19 Go ahead, counsel.

20 MR. STEPHENS: Thank you, your Honor.

21 DIRECT EXAMINATION OF CHARLES CALL

22 CALLED ON BEHALF OF THE DEFENDANT

23 BY MR. STEPHENS:

24 Q. Good afternoon, Mr. Call.

25 A. Good afternoon, Mr. Stephens.

1 Q. You testified as Personal Audio's corporate
2 representative pursuant to Federal Rule 30(b)(6) on the
3 topic of the reasons for not filing suit on the
4 '076 patent earlier, right?

5 A. I'm sorry. I don't recall what the topics were.

6 MR. STEPHENS: Your Honor, may I enlist
7 Mr. Nguyen to distribute some binders?

8 THE COURT: Please.

9 MR. STEPHENS: Your Honor, may I approach?

10 THE COURT: No. I want Mr. Nguyen or nobody.
11 (Mr. Nguyen enters courtroom.)

12 MR. STEPHENS: Here he is.

13 Well, Mr. Cordell will be able to substitute.

14 MR. CORDELL: I'll assist Mr. Nguyen, your
15 Honor.

16 MR. STEPHENS: Thank you, your Honor.

17 THE COURT: I've just received Jury Note
18 Number 2.

19 Jury Note Number 1 was the foreman, who was
20 Juror Number 4.

21 Jury Note Number 2 is a request for a
22 15-minute break. What I propose to do is inform the
23 court security officer he can tell them they can take a
24 break but remind them not to deliberate until all of them
25 are back in the room.

1 Any objection to me having the court security
2 officer handle it that way rather than by written note?

3 MR. SCHUTZ: No objection from Personal Audio.

4 MR. CORDELL: None from Apple, your Honor.

5 THE COURT: Okay. The court security officer
6 is here in the room.

7 Would you just please tell the jury they may
8 take a break, and for 15-minute breaks they can do that
9 when they wish. If it's going to be like a dinner break
10 or an overnight break, I do need a note from you so I can
11 give them some instructions.

12 COURT SECURITY OFFICER: Yes, sir.

13 THE COURT: But just remind them please don't
14 deliberate until they're all back in the room.

15 COURT SECURITY OFFICER: Yes, sir.

16 THE COURT: Okay.

17 Go ahead, counsel.

18 MR. STEPHENS: Thank you, your Honor.

19 BY MR. STEPHENS:

20 Q. Mr. Call, near the back of the binder that you now
21 have before you, there is a tab that says "PA's
22 Objections to Apple's 30(b)(6) Depo Notice." It's near
23 the very back. It's the third tab from the end.

24 THE COURT: I thought your point on this
25 one -- wasn't it that he didn't testify about a bunch of

1 things?

2 MR. STEPHENS: Well, there is that, your
3 Honor; but this is affirmative testimony that he did not
4 know why Personal Audio did not --

5 THE COURT: Oh, okay.

6 MR. STEPHENS: -- file suit earlier.

7 THE COURT: All right. Because I wasn't
8 really too interested in what he refused to testify about
9 because he wasn't going to testify about it here either.

10 MR. STEPHENS: Well, fair enough; but this is
11 a little bit different.

12 THE COURT: All right.

13 BY MR. STEPHENS:

14 Q. Are you with me, Mr. Call?

15 A. I have the document in front of me, yes.

16 Q. Okay. If you'd turn to page 16 of that document.

17 A. Okay.

18 Q. About halfway down the page there are objections
19 to Topic 28; and just above that it refers to the topic
20 itself. It says, "28. The reasons for not filing suit
21 on the '076 patent earlier." Do you see that?

22 A. I do.

23 Q. And then below that it gives the objections; and
24 it says, "Subject to Personal Audio, LLC's, general and
25 specific objections, it will designate Charles Call to

1 testify on this topic on either October 7 or 8, 2010."

2 Do you see that?

3 A. I see that.

4 Q. And you did, in fact, testify on that topic at
5 that deposition, right?

6 A. I don't recall when I testified, but I did
7 testify.

8 Q. Okay. Well, at that deposition I asked you, "Why
9 Personal Audio waited until 2009 to file suit on the '076
10 patent against Apple?"

11 And you said you did not know, right?

12 A. I -- if that's what I said, that's what I said.

13 Q. Okay. Let's take a look and make sure. The next
14 tab is Volume 1 of your deposition. And if you'll turn
15 to page 219, please, sir.

16 A. Do I have the deposition?

17 Q. Yes, the next tab in your binder after the tab we
18 were just at, near the back.

19 A. What page?

20 Q. 219.

21 A. I see the question by you, "Why did Personal Audio
22 wait until 2009 to file suit on the '076 patent against
23 Apple?"

24 There was an objection.

25 I said, "My difficulty with the question is

1 privilege, and I think the fair answer is I don't know."

2 Q. And those are your words, right?

3 A. Yes, they were.

4 Q. Thank you.

5 Now, when I asked you when Personal Audio
6 decided to sue Apple on the '076 patent, you declined to
7 answer on the ground of privilege, right?

8 A. Yes, sir.

9 Q. Okay. Now, you were also Personal Audio's
10 corporate designee pursuant to Federal Rule 30(b)(6) on
11 another topic which I'll direct you to. It's back in the
12 document we were just looking at, the objections, on
13 page 5, Topic Number 6. And that topic is "All facts and
14 circumstances relating to how and when Personal Audio
15 (including, without limitation, Charles Call and James
16 Logan individually) first became aware of Apple's accused
17 products, including without limitation: One, the date of
18 Personal Audio's first awareness of Apple's accused
19 products; two, any and all uses, analyses, examinations,
20 or investigations of Apple's accused products conducted
21 by or for Personal Audio prior to the assertion of its
22 claims against Apple; three, identification of all
23 persons with information relating to any such uses,
24 analyses, examinations or investigations."

25 Did I read that correctly?

1 A. I think you did.

2 Q. And then down below that, it says that (reading)
3 subject to the objections, Personal Audio would designate
4 Charles Call to testify on this topic.

5 Right?

6 A. That's right.

7 Q. And you testified on this topic, right?

8 A. Once again, I don't recall testifying on any
9 particular topic; but I testified at length for over two
10 days.

11 Q. Okay. And at that deposition you testified that
12 you did not remember when anyone involved with the
13 '076 patent became involved with any device that
14 potentially infringed, right?

15 A. Yes, sir.

16 Q. And you testified you did not remember whether
17 that happened before or after the '076 patent issued,
18 right?

19 A. I don't recall that.

20 Q. Okay. Let's take a look. It's at page 164 of
21 your deposition, starting at line 4. I asked, "When, to
22 your knowledge, did anyone involved with the '076 patent,
23 after it issued in March of 2001, become aware of any
24 device that potentially infringed?"

25 You responded, "Are you asking for the first

1 time?"

2 And then I said, "Yes. Actually, let me
3 change the time limit there so it doesn't necessarily
4 have to be before -- excuse me, after the issuance,
5 because sometimes people --"

6 And you said, "Right."

7 And I said, "-- know what they have pending
8 and start to think about products that might be out there
9 that might infringe when it does issue."

10 And your answer was "Right. I don't remember.
11 I don't remember."

12 A. Yes. You read that correctly.

13 Q. Okay. And, so, in fact, you could not remember
14 whether or not Personal Audio first became aware of
15 devices that potentially infringed even before or after
16 the '076 patent actually issued, right? Well,
17 actually --

18 A. Well, I think -- I certainly don't -- I did not
19 remember when I knew.

20 Q. Okay. And you were testifying on behalf of
21 Personal Audio as to --

22 A. Yes, sir.

23 Q. -- on that topic as well, right?

24 A. Yes, sir.

25 Q. Okay. And just below the portion I read, I asked

1 you, "Do you remember whether it was before or after the
2 patent issued, the '076 patent?"

3 And you said, "Before what?"

4 And I said, "The time when someone who had --
5 who was involved with the '076 patent or its application
6 became aware of some device out there in the real world
7 that might infringe."

8 And your response, at the top of page 165, is,
9 "You know, I can't -- I don't remember."

10 Is that right?

11 A. You've read that correctly, yes.

12 Q. And those are your words, right?

13 A. They are.

14 Q. You also could not remember when you first became
15 aware of hardware or software systems that would allow
16 you to play back playlists, right?

17 A. Yes, sir.

18 Q. And you could not remember when you learned that
19 Apple products used playlists, right?

20 A. That's correct.

21 Q. You could not remember when you first became aware
22 of the iPod, right?

23 A. Yes. I don't know when I first became aware of
24 the iPod.

25 Q. And you declined to tell me when anyone involved

1 in the '076 patent first began to believe that an iPod
2 might infringe, citing attorney-client privilege, right?

3 A. That's correct.

4 Q. You also declined to tell me whether anyone
5 involved with the '076 patent ever undertook an
6 investigation of the various players on the market to
7 determine if they infringe, again citing privilege,
8 right?

9 A. I don't recall that.

10 Q. Okay. Well, let's take a look at page 170 of your
11 deposition. And I asked you, at the top of the page,
12 starting at line 1, "Did anyone, to your knowledge,
13 involved with the '076 patent ever undertake an
14 investigation of the various players that were on the
15 market to determine whether or not they might infringe?"

16 And you answered, "Privileged."

17 A. Yes, sir, I did.

18 Q. Okay. You also declined to tell me whether anyone
19 was ever tasked with policing the market for products
20 that infringe the '076 patent, again citing privilege.

21 A. Yes, sir.

22 Q. And when I asked you what kind of investigation
23 Personal Audio had undertaken to determine whether Apple
24 infringed, you declined to answer again on privileged
25 grounds.

1 A. Where are you now?

2 Q. This is at page 219.

3 A. Can you show me that?

4 Q. Sure.

5 Starting at line 14, "What kind of
6 investigation of the iPod was undertaken in order to
7 determine whether or not to file suit?"

8 Answer, "I think that's privileged."

9 A. Yes, sir, that's what I said.

10 MR. ARENZ: Your Honor, I think I'm going to
11 object to this line of questioning to the extent
12 Mr. Stephens is trying to elicit some sort of adverse
13 inference based on a privileged objection. He hasn't
14 challenged the privileged objection at any point in this
15 case. I think it's incorrect to now use that against
16 Personal Audio.

17 THE COURT: Well, don't you run into a problem
18 here? When they send you a 30(b)(6) notice, you're
19 supposed to send the person who knows and then that
20 person doesn't answer. I just sent a note to
21 Ms. Mullendore, "Does attorney-client privilege excuse
22 someone from complying with 30(b)(6) requirements?"

23 I mean, I think we're taking a long time to
24 get to it; but isn't that your point, Mr. Stephens, is
25 that basically they have no defense since you gave them a

1 30(b)(6) notice? They gave someone who said he didn't
2 know or wouldn't answer; so, thus, given the presumption
3 of *laches*, they're doomed?

4 MR. STEPHENS: Exactly right, your Honor.

5 THE COURT: Okay. And your point -- I mean,
6 how do you meet that? You've got a 30(b)(6) notice.
7 Under the rules and the cases, under 30(b)(6) you're
8 bound by what is said. You're required to come up with a
9 witness. You're required to educate that witness and
10 give them all the information necessary. If it's going
11 to take more than one witness, then you've got to
12 identify more than one.

13 And now we've got this problem of you put
14 forward a witness who -- and I can understand because he
15 was an attorney and he was also the trust's attorney.
16 But isn't the result then -- I actually -- I'm familiar
17 with 30(b)(6), and I'm familiar with the cases. This
18 precise issue I've never seen when you've got an attorney
19 claiming privilege. Too much to hope for that somebody
20 has that white-horse case they can hand it to me and --

21 MR. STEPHENS: I'm sorry, your Honor; but
22 we're happy to take a look for it.

23 THE COURT: Well, since it's your theory, I'd
24 have thought you would have been riding that horse real
25 hard and have it ready.

1 Let me ask you. He's trying to put you in a
2 real hard spot. I understand that. So, how do you deal
3 with it?

4 MR. ARENZ: I think to the extent the
5 responsive answer is privileged, that the Federal Rules
6 of Civil Procedure do not allow an entity to compel
7 Personal Audio or any party to disclose privileged
8 information.

9 THE COURT: Right, but the 30(b)(6) notice
10 isn't "Give us privileged information." It's "Give us
11 information that's relevant to the case." I mean, it's
12 who has the information about these topics.

13 MR. ARENZ: Well, on the topic of --

14 THE COURT: That's what I'm saying. Do you
15 have any authority for the proposition that you can
16 receive a 30(b)(6) notice and then have your attorney
17 show up and say, "Sorry, privileged" and then never come
18 up with another 30(b)(6) witness?

19 MR. ARENZ: I'm referring to this question
20 which I think calls for privileged information, whether
21 Mr. Call or Mr. Logan were to testify, that some sort of
22 investigation to the extent it was done as part of an
23 attorney-client relationship is not subject to discovery.

24 THE COURT: Well, aren't you actually required
25 under the rules to have conducted an investigation before

1 filing a patent suit like this?

2 MR. ARENZ: Yes.

3 THE COURT: Okay.

4 MR. ARENZ: But to the extent that --

5 THE COURT: And then again -- I mean, I
6 understand. He's an attorney, but you're the one who put
7 him up on the 30(b)(6) deposition -- maybe not you
8 personally but --

9 MR. ARENZ: He was answering on behalf of an
10 entity.

11 THE COURT: Yeah.

12 MR. ARENZ: And my point is whether Mr. Call
13 who was an attorney would show up to give the answer or
14 Mr. Logan who is not an attorney -- the answer would be
15 the same because any sort of investigation would bring in
16 the attorney-client relationship and attorney-client
17 activities.

18 THE COURT: Okay.

19 MR. ARENZ: And, judge, if I may, I do want to
20 add that he's testifying on behalf of Personal Audio,
21 LLC, which was an entity that was established in 2009 and
22 not a broader scope; and, for that matter, Personal Audio
23 is two people. Mr. Logan was deposed for two days. They
24 asked him all the same questions. So, they weren't
25 deprived of any ability to really get to the heart of

1 these issues.

2 MR. STEPHENS: Your Honor, may I respond to
3 that?

4 THE COURT: Well, wait. How do you deal with
5 the 30(b)(6) -- are you familiar with the cases that talk
6 about how you're bound -- in fact, I even give a jury
7 instruction on that when requested. If a witness on the
8 stand starts to hedge when they're a 30(b)(6), I tell the
9 jury that the defendant or the plaintiff, whoever it is,
10 was required to come forward with somebody -- I mean, the
11 standard instruction is "It's the responsibility of the
12 entity to identify the employee or employees who have
13 knowledge of these topics and to be sure they have access
14 to pertinent documents and have talked to other employees
15 if necessary so they are prepared to answer questions on
16 the specified topics."

17 And I guess what I'm wondering is is how do
18 you deal with -- you received these 30(b)(6) notices and,
19 so, instead of identifying Mr. Logan, you identify an
20 attorney, putting him in a bad spot perhaps.

21 MR. ARENZ: My colleague is pointing out that
22 we don't have it on-hand; but we believe there is case
23 law that suggests if you do take a 30(b)(6) deposition
24 and they believe that the witness does not have
25 responsive answers, that they are then entitled to seek

1 additional depositions later, which included Mr. Logan,
2 in this case, for two days.

3 THE COURT: Well, they are entitled but --
4 maybe. I suppose they could move to compel; but on the
5 other hand, I think the responsibility under the cases is
6 on the party who receives it to make sure they have the
7 person and they've educated that person or provided them
8 with the information necessary.

9 I think you've got your cases backwards.

10 And I guess my concern here is -- and I'm not
11 going to force him to answer a question over the
12 privilege, but the problem you still have is, all right,
13 how are you going to meet the *laches* -- how do you even
14 burst the bubble of *laches*? How do you get any evidence
15 in when your 30(b)(6) representative says, "No. No.
16 No"?

17 MR. ARENZ: Well, first of all, I think they
18 still have to establish -- well, let me start over.

19 To burst the bubble to the extent of
20 presumption is in place. We can do that by a showing of
21 no prejudice.

22 And on the issue of 30(b)(6) witnesses, Apple
23 did not designate a witness to testify on economic
24 prejudice or evidentiary prejudice. So, that alone
25 bursts the bubble and places it back in Apple's court.

1 THE COURT: Okay. So, you agree, then, that
2 the burden is now on you?

3 MR. ARENZ: No. No, we do not. You
4 suggested --

5 THE COURT: How are you going to get beyond
6 that? If your witness won't say anything at all about
7 reasons or anything else, why doesn't it just go to you?
8 Why don't we start -- I mean, we don't have a jury here.
9 Why should I spend a half an hour listening to an endless
10 rendition of a 30(b)(6) witness who wouldn't answer?

11 MR. ARENZ: Well, again, first of all, our
12 30(b)(6) witness, he did answer some questions. He --

13 THE COURT: Well, not about why you didn't
14 file -- or why you didn't pursue the suit.

15 MR. ARENZ: Well, first of all, the initial
16 inquiry to determine whether any sort of presumption
17 would arise is whether they knew or should have known of
18 infringement. And again, Mr. Call was testifying on
19 behalf of Personal Audio, LLC. Mr. Logan has plenty of
20 knowledge about his involvement with the trust back since
21 2001 and ongoing and onward.

22 THE COURT: We've already -- we already have
23 testimony in the trial that -- from, I believe,
24 Mr. Logan, that back in 2001 he -- for that matter,
25 perhaps Mr. Dan Goessling; but I remember Mr. Logan

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1 saying that yeah, they started to think about it in 2001.

2 MR. ARENZ: I'm not familiar with that
3 testimony, sir.

4 THE COURT: You probably have -- somebody was
5 saying that in 2001.

6 MR. STEPHENS: Your Honor, certainly Mr. Logan
7 testified that he was aware of the iPod in 2001. I don't
8 know if that's trial testimony or deposition testimony.
9 Ms. Hunsaker is going to --

10 THE COURT: Well, I mean, it's come before me
11 somehow in one way or the other.

12 MR. STEPHENS: We will certainly elicit it
13 here today, your Honor, if it's not --

14 THE COURT: Well, let's see if we can maybe
15 save some time. What is the point you're trying to --
16 any other point you're trying to make with this line of
17 questioning with this witness other than it's a 30(b)(6)
18 witness who did not -- or would not -- whether it's for
19 privilege or whatever, wouldn't answer any questions
20 about why suit wasn't filed, why there was any delay,
21 anything like that?

22 MR. STEPHENS: That's right. That's the only
23 point for that line of questioning, your Honor.

24 THE COURT: Okay. Any cross on that issue?

25 MR. ARENZ: Your Honor, again, the point is

1 Mr. Call was designated as a representative of Personal
2 Audio, LLC.

3 THE COURT: They're the plaintiff, aren't
4 they?

5 MR. ARENZ: Yes, sir. And that entity was
6 formed in 2009, and he was testifying in that context.

7 Before 2007, in fact, he never had any
8 ownership interest or any stake in the patents and to the
9 extent that Apple needed additional knowledge, they
10 needed to depose Mr. Logan, which they did and they asked
11 him these questions and we objected to the scope of the
12 30(b)(6) notice as not going beyond Personal Audio, LLC,
13 as an entity, that Mr. Call was not testifying about any
14 entity before Personal Audio, LLC.

15 THE COURT: Well, hold on.

16 MR. STEPHENS: Your Honor, I have the 30(b)(6)
17 notice here with the --

18 THE COURT: I'm looking at it.

19 MR. STEPHENS: Okay. Definition Number 1,
20 you've probably already focused on that.

21 And I'd also point out that Mr. Logan was
22 never designated on this topic.

23 THE COURT: What was the first topic you
24 talked about when you started this line off? I've got
25 Number 6, but there was another one you had identified.

1 MR. ARENZ: I believe 28 and 16.

2 MR. STEPHENS: That's right. That's correct.
3 Page 9 of the notice.

4 THE COURT: Well, okay. Who is the next
5 witness?

6 MR. STEPHENS: Your Honor, I did have a few
7 more questions on the question of evidentiary prejudice
8 and on inequitable conduct for Mr. Call.

9 THE COURT: Okay.

10 MR. STEPHENS: It should not take very long.

11 BY MR. STEPHENS:

12 Q. Mr. Call, in your deposition you said you could
13 not remember if you performed any prior art investigation
14 in connection with filing the '076 patent, right?

15 A. In connection with the filing, that's correct. I
16 could not remember.

17 Q. And you also could not remember -- well, in fact,
18 you never cited any prior art during the prosecution of
19 the '076 patent, right?

20 A. That's correct.

21 Q. Okay. Now, you wrote a patent application
22 sometime before March 28th, 2000, that specifically
23 mentions playlist software used by radio stations, right?

24 A. I'm -- that doesn't come to mind. Can you direct
25 my attention to something?

1 Q. I can. Exhibit DX 62 in your binder.

2 MR. ARENZ: Your Honor, I object to this
3 because this exhibit was not disclosed ahead of this
4 bench trial when we exchanged exhibit lists last night.

5 MR. STEPHENS: It should have been -- well, I
6 don't have to use the exhibit. That's okay. We can do
7 it from deposition testimony.

8 THE WITNESS: Well, I've been examined on this
9 before. I recognize the document, and I did -- I wrote
10 part of this, not all of it.

11 MR. STEPHENS: Your Honor, I leave it up to
12 you. I could do this with or without this exhibit.

13 THE COURT: Well, what's the point?

14 MR. STEPHENS: Well, the point is that this is
15 an application that Mr. Call drafted and reviewed and it
16 specifically mentions playlist software used by radio
17 stations and it was filed in 2000.

18 THE WITNESS: Yes.

19 MR. STEPHENS: And then I'll elicit some
20 testimony following that. That's really the main point
21 for this particular patent.

22 MR. ARENZ: Judge, I would also object. This
23 is outside the scope of the proposed findings. This is a
24 new allegation. I've never heard of this before.

25 MR. STEPHENS: Your Honor, there's --

1 THE COURT: Well, I'm going to overrule that.
2 So, your point here is that if he knew this,
3 he should have disclosed it?

4 MR. STEPHENS: Well, it's more than that, your
5 Honor. I think there is a fair inference here that
6 Mr. Call or Mr. Logan or Mr. Goessling -- and likely all
7 three -- knew about the DAD system and manual before the
8 '076 patent was issued. I think you can draw --

9 THE COURT: I thought there was evidence that
10 they -- somebody at least provided a brochure and then
11 later on they got dinged by PTO when they tried to get in
12 the manual. They said, "No, you didn't use the right
13 form" or something.

14 MR. STEPHENS: Well, that also happened, your
15 Honor. That's part of the '178 file history. I'm going
16 to cover that as well.

17 THE COURT: Well, what about the brochure?
18 With which patent was that filed?

19 MR. STEPHENS: The '178.

20 THE COURT: Okay.

21 MR. STEPHENS: There was no prior art filed by
22 the patent owner in connection with the '076 at all.

23 MR. ARENZ: Your Honor, my objection is we
24 were in the middle of trial; and they had five different
25 inequitable conduct allegations. On Monday they narrowed

1 it down to one. The allegations Mr. Stephens is talking
2 about right now was never part of this case, never pled,
3 never identified in interrogatory response; and, frankly,
4 it's unfair surprise.

5 MR. STEPHENS: Your Honor, this is all about
6 whether or not the DAD reference was disclosed. This has
7 been in the case from the beginning, or at least for a
8 long time now.

9 MR. ARENZ: Well, he should identify that in
10 his pleading with specificity then because this
11 allegation was not included. There has never been an
12 allegation against the DAD manual relating to the
13 '076 patent.

14 MR. STEPHENS: Your Honor, we'll stand on our
15 pleadings; but I still think this is relevant even if --

16 THE COURT: Okay. Hold up, Mr. Stephens. Let
17 me --

18 MR. STEPHENS: I'm sorry. I apologize.

19 Your Honor, after conferring with my
20 colleagues, I'll just move on and we'll deal with the
21 '178 patent.

22 THE COURT: Okay. Go ahead.

23 MR. STEPHENS: Okay. Give me one second here
24 to find my place, and I will.

25 *

1 BY MR. STEPHENS:

2 Q. Okay. Mr. Call, Robins Kaplan gave you a copy of
3 the DAD manual before the '178 patent claims were
4 allowed, right?

5 A. I'm sorry. Yes, they did.

6 Q. Okay. And that happened on or about December 11th
7 of 2008; is that right?

8 A. That's correct.

9 Q. And then the Patent Office issued a Notice of
10 Allowance on the '178 patent on January 28th, 2009; is
11 that right?

12 A. I believe that's correct, yes.

13 Q. Okay. And you studied the DAD manual between the
14 time you received it and the time you got the Notice of
15 Allowance, right?

16 A. Yes.

17 Q. And it took you a while to study it because of its
18 bulk, right?

19 A. Yes.

20 Q. And you actually were aware of the Notice of
21 Allowance before you submitted the DAD manual to the
22 Patent Office, right?

23 A. I was aware of it I think the day I submitted it.
24 I had checked online. I was about to mail it, and I
25 checked online and found out that the Notice of Allowance

1 had been mailed. I had not yet received it, but I knew
2 it had issued.

3 Q. Okay. Now, the Notice of Allowance gave reasons
4 for allowance, right?

5 A. Yes, it did.

6 Q. And those reasons included downloading a
7 sequencing file in program segments from a server?

8 A. The examiner states his reasons for allowance, and
9 it's in there. I don't recall the precise wording, but
10 it is in the Notice of Allowance.

11 Q. Okay. But you recall they included downloading a
12 sequencing file from the server?

13 A. I'm sorry. I don't remember the words used.

14 Q. Well, let's take a look. DX 116 is in your book.
15 That's the file history for the '178 patent. If you'll
16 turn to page 374.

17 Are you with me, sir?

18 A. Yes, I've found it.

19 Q. Okay. And there is a statement of the examiner's
20 reasons for allowance near the bottom of the page?

21 A. Yes.

22 Q. And the second sentence says, "Specifically, the
23 prior art does not teach, suggest, or make obvious (in
24 combination with the other elements of the claims) an
25 audio program player that has a communications port to

1 download from one or more server computers a sequencing
2 file and a plurality of audio program files" and then it
3 goes on, right?

4 A. Yes. You've read that correctly.

5 Q. Okay. Now, when you submitted the DAD manual to
6 the Patent Office, you directed the examiner to some
7 specific pages, right?

8 A. I did.

9 Q. Let's take a look at that. That's at page 388 of
10 the '178 file history.

11 A. What's the page number?

12 Q. 388.

13 A. Yes.

14 Q. And that's the Information Disclosure Statement
15 that you filed?

16 A. It is.

17 Q. And cite R-3 is for the DAD manual; is that right?

18 A. That's correct.

19 Q. And you directed the examiner specifically to
20 pages i-ii, I guess Roman Numerals i and ii, and then 3-1
21 to 3-15 and 5-1 to 5-16; is that right?

22 A. I did.

23 Q. And that's it. Those are the only pages you
24 directed him to specifically, correct?

25 A. Yes.

1 Q. Now, those pages don't include page 7-11, right?

2 A. They do not. Yes.

3 Q. Okay. And the pages don't disclose -- the pages
4 that you cited don't disclose using the copy or move
5 commands to download audio files, right?

6 A. I'm sorry. When I put that indication in there, I
7 had reviewed the DAD manual. I pointed the examiner to
8 the parts of it that I thought might be helpful to him to
9 look at. I don't remember what is in or out of that
10 section.

11 Q. Okay. So, you don't remember whether you directed
12 him to any of the parts that describe downloading audio
13 files, right?

14 A. I don't specifically remember what those sections
15 refer to or don't refer to, no.

16 Q. Okay. And the same would be true for downloading
17 playlists, right?

18 A. I don't know what those sections refer to,
19 counsel. I just don't remember.

20 Q. Okay. So, for me to go through and point out that
21 they don't specifically include the "import playlist"
22 command or the "playback_lookahead" or the "copy or move
23 for downloading audio files with a download playlist"
24 command, you're not going to remember whether that's in
25 those sections without actually --

1 A. Sitting here, I don't remember what's in those
2 sections, no.

3 Q. Okay. Well, I'll just walk through the citations.
4 It doesn't include 7-11, right?

5 A. I agree with that.

6 Q. Doesn't include --

7 THE COURT: Counsel, I can read what it
8 doesn't include. We could be here all night. Doesn't
9 include *Encyclopedia Britannica*.

10 MR. STEPHENS: Fair enough, your Honor. I'll
11 wrap this up.

12 BY MR. STEPHENS:

13 Q. Before the '178 patent issued, Mr. Call, you
14 learned that the examiner did not consider the
15 DAD manual, right?

16 A. I did.

17 Q. And at that point you could have withdrawn the
18 patent from issue and asked the examiner to consider the
19 DAD manual, right?

20 A. That would have been possible.

21 Q. Okay. But you chose not to do that.

22 A. I chose not to do that.

23 Q. Okay.

24 MR. STEPHENS: Your Honor, we're outside the
25 presence of the jury. I would like to ask him a few

1 questions about the reexamination if that's permissible.

2 THE COURT: What's the point? That they've
3 now disallowed those claims?

4 MR. STEPHENS: To establish materiality, your
5 Honor. I think you could take judicial notice of that,
6 but I could ask him the factual predicate if you'd like.

7 THE COURT: Isn't materiality to be considered
8 at the time?

9 MR. STEPHENS: Well, I think, your Honor,
10 materiality now had -- there is a "but for" requirement.
11 You have to establish --

12 THE COURT: But isn't the -- whether or not it
13 was material depends on materiality at that time, not so
14 much whether it's material today.

15 MR. STEPHENS: Well, sure, your Honor. Of
16 course it would have had to have been material at the
17 time.

18 THE COURT: Okay. So, the fact that later on
19 someone decided it was material -- I mean, I suppose it
20 might be instructive that an administrative or quasi
21 judicial body found it material at some later date; but
22 isn't the issue whether it was material at the time he
23 didn't do it?

24 MR. STEPHENS: Well, your Honor, the point I
25 guess is that the claims are identical. The claims that

1 issued are the claims that have been rejected, and the
2 prior art dates are all the same. The filing date for --
3 the priority date for the patent, the date for the
4 DAD manual, nothing has changed. The only difference is
5 that it's before a different examiner.

6 THE COURT: Well, one of skill -- I mean, I'm
7 not sure exactly what test they used; but if there had
8 been advances in technology -- what someone might think
9 is material today based on what we know today about
10 nuclear science, for example, would be a whole lot
11 different than what someone would have thought ten -- or,
12 heck, iPods. What somebody thinks today is material in
13 the iPod industry is a whole lot different than what they
14 might have thought about, say, in the year 2000.

15 MR. STEPHENS: Your Honor, the test I believe
16 is fixed in time and --

17 THE COURT: Right.

18 MR. STEPHENS: -- in 1996 when the original
19 priority application was filed. So, the examiner should
20 be applying a materiality test, a patentability test,
21 when he is looking at the claims of prior art that's
22 fixed at that date.

23 THE COURT: But I'm going to have to make the
24 decision. So -- all right. I know that they evidently
25 rejected the claims; but I can't see that that

1 determination has much more effect on me than a district
2 court from another -- a federal district court in another
3 state. Might be instructive, but --

4 MR. STEPHENS: Well, your Honor, the question,
5 of course, of materiality is what would the patent
6 examiner have done, would the patent examiner have
7 rejected the claims over the DAD manual. And the
8 reexamination I think, your Honor, is evidence that you
9 could consider to show that, in fact, an examiner has
10 done that and that would support the inference that the
11 examiner in that case would have --

12 THE COURT: Okay. Go ahead.

13 MR. STEPHENS: Okay. Go ahead and inquire
14 about the reexam or --

15 THE COURT: Well, no. I understand. I've
16 read they have gone ahead and disallowed those claims.
17 That's --

18 MR. STEPHENS: Fair enough.

19 THE COURT: I understand that.

20 MR. STEPHENS: I'll leave that at that, your
21 Honor.

22 Just a few more questions.

23 BY MR. STEPHENS:

24 Q. Mr. Call, the '178 patent was abandoned during
25 prosecution, right?

1 A. It was.

2 Q. And you couldn't remember why that was, in your
3 deposition, right?

4 A. I know why it was. I failed to file a paper on
5 time. I couldn't remember how it happened.

6 Q. Well, let's take a look at your testimony.

7 A. The file history reflects what happened. I just
8 have no memory of those events.

9 Q. So, you don't know why the paper wasn't filed on
10 time, right?

11 A. That's correct.

12 Q. Okay.

13 THE COURT: Let me -- along that line, maybe
14 counsel know off the top of their head. This rejection,
15 is it final?

16 MR. STEPHENS: It is what they call an "action
17 closing prosecution," your Honor. So, there is one
18 more -- there was one more ability for both sides to put
19 in some papers. The next thing that will happen is the
20 right of appeal notice; and at that point the Patent
21 Office, except for the Board of Patent Appeals, is done
22 with it.

23 THE COURT: Right. But then the board of
24 appeals gets it, and then what?

25 MR. STEPHENS: Assuming that Personal Audio

1 continues to pursue it, then they'll get to file a brief
2 appealing the examiner's final rejection under the right
3 of appeal notice and then the Board of Patent Appeals and
4 Interferences will hear that appeal and make a decision.

5 THE COURT: And then --

6 MR. STEPHENS: And then from there they appeal
7 to the Federal Circuit, I believe.

8 THE COURT: Okay. So, their decision, just
9 like the other ones -- and I'm just trying to -- I just
10 want to be clear it's in the record. Their decision goes
11 up to the Federal Circuit just like my decision would,
12 right?

13 MR. STEPHENS: They could be there at the same
14 time, your Honor.

15 THE COURT: Okay. All right. Go ahead.

16 MR. STEPHENS: That's all I have, your Honor.
17 Thank you.

18 MR. ARENZ: Yes, your Honor.

19 CROSS-EXAMINATION OF CHARLES CALL

20 BY MR. ARENZ:

21 Q. Mr. Call, how long have you been involved in
22 patent prosecution?

23 A. Since mid 1960.

24 Q. And I'm going to be clear about something. Did
25 you intend to deceive the PTO about the DAD manual in

1 connection with the '178 patent?

2 A. No, sir.

3 Q. Just -- you received the DAD manual on
4 December 11, 2008, correct?

5 A. Yes.

6 Q. And did you receive any other documents that day?

7 A. I did. I received additional publications, and
8 then in early January I received a list of patents.

9 Q. Will you please explain to Judge Clark or describe
10 those other publications you had received back in
11 December?

12 A. I believe they were -- copies of the other
13 publications are attached to the Information Disclosure
14 Statement, and they're in the file history. There were
15 five printed publications, two of which were quite bulky.
16 One of them was the DAD manual, and another one was a
17 book.

18 Q. And about how big was that book?

19 A. The book was 1,024 pages long.

20 Q. And what about the DAD manual?

21 A. You know, it's quite thick, too.

22 Q. Okay. What was the status of the prosecution at
23 the time you received those publications?

24 A. I had filed a response to a prior Office Action in
25 October, and I was awaiting a further action from the

1 Patent Office.

2 Q. Did you know when or if the examiner would issue a
3 Notice of Allowance?

4 A. No.

5 Q. Now, what did you do after you received the
6 DAD manual and those other publications?

7 A. I reviewed them, those and -- there's a list of
8 patents, I think 19 patents, that I also looked at. I
9 put them together in a binder with this statement, and I
10 was ready to send them to the Patent Office. I checked
11 online, as I could do at that time; and I found that the
12 office had issued the Notice of Allowance. It hadn't
13 been received yet, but it was on its way.

14 So, then I had to redo the forms because after
15 the application is allowed, there is a different rule you
16 have to set yourself under. So, I had to redo some
17 papers; but then I filed it.

18 Q. What do you mean by you "filed" it?

19 A. I put it in an Express Mail envelope and took it
20 to the post office and mailed it to the Patent Office.
21 Under the Patent Office rules, when the post office gets
22 it, that's like filing it in the Patent Office. So, I
23 got the credit for that date.

24 Q. Okay. And -- well, why don't we take a look at
25 that date. If you'll look at Exhibit 802, Tab 18. Do

1 you have that in front of you, sir?

2 A. Yes. I have it in front of me.

3 Q. And you referenced the date. What does this stamp
4 indicate to you?

5 A. The stamp in the upper left-hand corner, the
6 circular stamp, is the Patent Office's received stamp.
7 Almost certainly they actually got it later than that,
8 but they stamp it with the mail date. So, you get credit
9 for the January 30th date. That -- January 30th would
10 have been the date that I gave it to the post office.

11 Q. And, sir, is this the IDS you prepared?

12 A. It is.

13 Q. Now, did you follow PTO guidelines and rules when
14 you submitted this IDS statement?

15 A. I did.

16 Q. And explain how you complied with those rules and
17 guidelines.

18 A. Well, there is a standard form. You list patents
19 separately. Patents are just listed by number. You
20 don't need to supply copies because the Patent Office has
21 copies of patents, obviously.

22 Publications, they typically don't have; so,
23 you're required to submit copies of the publications.

24 In this case -- and the reason I mailed this
25 rather than sending it in by fax or some other form was

1 that the DAD manual was very thick. I actually got a
2 copy of -- two copies of this book from Amazon, and I
3 actually sent along a copy of the book as well as these
4 other materials in the same envelope with this to the
5 Patent Office on January 30th.

6 Q. Do you know whether or not the PTO actually
7 received those publications including the DAD manual?

8 A. They did receive everything.

9 Q. I'm going to direct your attention now to
10 Exhibit 802, Tab 18, at 406 -- pardon me -- Tab 18,
11 page 408.

12 A. Yes, the artifact sheet. I have it in front of
13 me.

14 Q. And what is an artifact sheet?

15 A. When the Patent Office receives things in the
16 mail, they go into the file and it's their practice to
17 scan everything optically so they have a digital record.
18 When they have very bulky things or certain other things
19 that they can't scan, the paper handling folks are
20 supposed to put in an artifact sheet and indicate --
21 essentially as a substitute for the stuff that isn't
22 scanned that goes into the file. So, this is a sheet
23 that they filled out; and it indicates that the two
24 books, indicated at the bottom of the page, were placed
25 in a folder with this number. The number is the

1 application serial number followed by a code. And those
2 two books then were placed in a folder, and they should
3 have gone with the other papers to the examiner.

4 Q. And did you fill out this artifact sheet, or did
5 the PTO?

6 A. No. The Patent Office staff fills this out.

7 Q. So, just so we're all clear, you submitted the
8 DAD manual in connection with prosecution of the
9 '178 patent?

10 A. I did.

11 Q. And the PTO actually received the DAD manual,
12 correct?

13 A. They did. But they separated out the two books
14 and did not scan them; and this is just a reflection of
15 the fact that they had it, they separated it out, and
16 they put it in this folder.

17 Q. Now, Mr. Call, I want to go to page 407. This is
18 the part of the IDS where you identify the publications
19 that you are submitting with the IDS, correct?

20 A. Yes.

21 Q. And Mr. Stephens directed your attention to your
22 identification of certain pages. Do you remember that?

23 A. Right. I recall that.

24 Q. Now, are you required to provide this
25 identification?

1 A. No.

2 Q. And let me ask a more general question. Are
3 patent prosecutors required to identify portions of a
4 voluminous reference like this?

5 A. If you have a voluminous record -- for example, a
6 journal with many articles in it -- you're required to
7 identify the specific page where that article is but
8 you're not --

9 MR. STEPHENS: Your Honor, I object. He can
10 testify of what his knowledge of the requirements are,
11 but I don't think he can testify as to what the
12 requirements themselves are. He's not been identified as
13 an expert in this case.

14 THE WITNESS: This is in --

15 THE COURT: Where are the requirements? Are
16 they in the --

17 THE WITNESS: They're in Title 37 CFR 1.97 and
18 around there. It's the Patent Office rules of practice.

19 THE COURT: That's what I was trying to drag
20 up. We have a copy.

21 It's amazing how Ms. Mullendore can read my
22 mind and hand me exactly what we're talking about right
23 here.

24 Okay. It's part of the *Manual of Patent*
25 *Examining Procedure*. I'll overrule the objection, I

1 mean, unless you think he's misstating what it states and
2 you can point it out to me.

3 MR. STEPHENS: Not at all, your Honor. I just
4 would object to him saying what the law is.

5 THE COURT: No. Just so everybody knows, I'm
6 not going to accept from any witness what the law is.
7 I've got to determine that. I'm required to. But I
8 think he is properly stating because I have a copy of it
9 here in front of me. So, go ahead.

10 MR. STEPHENS: Thank you, your Honor.

11 BY MR. ARENZ:

12 Q. So, sir, do you understand that it is a suggested
13 practice but not a required practice?

14 A. Well, you have to comply with the rules; and
15 that's what I was trying to do. There is no requirement
16 that you point out to the examiner any specific passage.

17 Q. And, so, why did you point out specific passages
18 in this instance?

19 A. Because I had been given these books and I had to
20 go through them. I thought it might be helpful if I give
21 them a pointer of where he might start looking.

22 The examiner is going to look at this for his
23 own purposes to try to find out what he's looking for and
24 then -- the examiner is going to do something, and I need
25 to respond to that. By putting these in here, I'm not

1 saying that they're material. I'm just saying here it is
2 and the examiner knows what he's doing and I will respond
3 in due course to whatever he does with that.

4 Q. Okay. Mr. Call --

5 THE COURT: Okay. Let's hold up a second.

6 We had somewhere earlier in the evidence at
7 least one copy of the DAD manual, didn't we?

8 MR. STEPHENS: Yes, your Honor, Defendant's
9 Exhibit 1.

10 MR. ARENZ: There is an excerpt, your Honor,
11 in my binder in front of you.

12 THE COURT: I have Defendant's Exhibit 1 right
13 here. Thank you.

14 And it appears that I have the same one
15 referenced by Mr. Call, Version 6.0A, June 30, 1995.

16 You started off this -- I'll note for the
17 record this Section 3-1 to 3-15 is what's in the manual,
18 called the "tutorial"; and then it has subsections: the
19 environment, the screen layout, tutorial, recording of
20 cut and audio cut and building a playlist, loading and
21 playing a playlist, what's next, exiting a program.

22 He also referenced the table of contents,
23 which pretty much covers all of it.

24 And then in particular this Section 5-1 to
25 5-16 goes over playback, playback functions and so forth.

1 THE WITNESS: Your Honor, I have learned later
2 that there were more pages after 5-16 that I did not
3 have. The copy that I had stopped at 5-16 and there were
4 missing pages and I think there are other pages that I
5 did not have at that time that are in -- that were in
6 other copies of that manual, but I didn't have them.

7 THE COURT: All right. And, Mr. Stephens, you
8 were pointing out that he didn't include 7-11 which has
9 the copy and move functions; and I thought you referenced
10 something else.

11 MR. STEPHENS: Yeah. Bear with me one second,
12 your Honor. I'll give you that list.

13 7-11, 10-4, 5-18, 7-19, 7-20. Those are
14 examples. I think there's more. The point was that it
15 didn't disclose the specific functionality that was the
16 subject of the trial.

17 THE COURT: Okay. And how do you respond to
18 the point that what the rules -- or CFR requires is that
19 the document be provided, the specific "see certain
20 pages" is not?

21 THE WITNESS: That's right. That was just
22 voluntary on my part --

23 THE COURT: I'm asking the attorney.

24 THE WITNESS: I'm sorry.

25 MR. STEPHENS: Two ways, your Honor. One is

1 that the document ultimately was not considered and
2 Mr. Call knew that and could have taken corrective action
3 and I have a case cite, your Honor, that shows that that
4 can support the inference of inequitable conduct.

5 THE COURT: Okay. He knew that the patent
6 examiner didn't work hard enough and he should have
7 called it to his attention?

8 MR. STEPHENS: No. I'm sorry. And maybe I'm
9 confusing issues here. So, that goes to the entire
10 manual. The examiner specifically told him that he did
11 not get it because of this artifact issue and was not
12 going to consider it.

13 So, there is a later response from the Patent
14 Office that specifically says that this document was not
15 considered at all, not these pages, no pages.

16 And Mr. Call knew that before the patent
17 actually issued; and he could have withdrawn it from
18 issue, filed a request for continuing examination, and
19 had the examiner consider it. And the law says that not
20 doing that can support an inference of inequitable
21 conduct.

22 THE COURT: Okay. And if we -- but the case
23 you're dealing with comes before or --

24 MR. STEPHENS: It is before --

25 THE COURT: -- before or after the string of

1 cases that -- there was a series of cases where
2 Judge Rader dissented on the overuse of inequitable
3 conduct. Well, now he's the chief judge; and he's no
4 longer dissenting. He's writing majority opinions on
5 this issue, such as *Therasense, Inc. v Becton*,
6 *Dickinson & Co.*, and even a somewhat dull judge can
7 figure out that he's not real happy with the overuse
8 of -- and this has been going on even since *Aukerman*.
9 Even since that there's been a long string of cases where
10 the court has been very concerned about the overuse of
11 this. So, the case you're talking about, when was it
12 dated?

13 MR. STEPHENS: It was dated in 1994, your
14 Honor. It's an old case and we certainly have read
15 *Therasense* and these other cases -- at least some of the
16 other cases you mentioned, and taken them to heart.
17 That's why we dropped most of our inequitable conduct
18 allegations.

19 THE COURT: All right.

20 MR. STEPHENS: And I can't tell you with
21 certainty, your Honor, that *Therasense* might not have an
22 effect on this analysis. I'm sure at a minimum it
23 significantly heightens the materiality requirement. No
24 question about that.

25 THE COURT: Okay. All right. Go ahead,

1 counsel.

2 BY MR. ARENZ:

3 Q. So, let's be clear, Mr. Call. You didn't just
4 submit portions of the DAD manual to the PT0, did you?

5 A. No. I submitted the whole thing.

6 Q. Okay. And --

7 A. With the exception of those missing pages that
8 weren't in the copy I had.

9 Q. Do you recall where the missing pages started?

10 A. I'm informed after 5-16 there were more pages.

11 Q. Okay. And Mr. Stephens identified 5-18 as
12 something that you may have somehow tried to withhold
13 from the examiner.

14 A. That would have been a page I didn't have.

15 Q. Do you know if Mr. Stephens knew that you did not
16 have a complete DAD manual when you submitted it at that
17 time?

18 MR. STEPHENS: Objection, your Honor. This
19 calls for hearsay.

20 MR. ARENZ: Your Honor, we have --

21 THE COURT: Well, wait a minute. You're
22 asking him whether Mr. Stephens knew -- why does that
23 matter?

24 MR. ARENZ: Well, I think it's an equitable
25 issue and the fact of the matter is that we asked Apple,

1 when this case started, for a complete DAD manual; and
2 they refused to give it to us on multiple occasions until
3 March of this year. And the fact that he's now using
4 this still as a basis, knowing that he didn't have a
5 complete manual, is surprising. We've had conversations
6 with --

7 THE COURT: All right. Well, I'm not sure how
8 he's going to read somebody's mind; so, let's get on to
9 the next question.

10 MR. ARENZ: Will do, your Honor.

11 BY MR. ARENZ:

12 Q. Sir, when you identified certain sections to the
13 PT0, did you try and hide the idea of playlists from
14 them?

15 A. No.

16 Q. Let's look at Defendant's Exhibit 1 in your book.
17 And if you would go to page 65, This is one of the
18 sections that you, in fact, called to the examiner's
19 attention, correct?

20 A. I'm sorry. What page?

21 Q. We're on page 65, and it's 3-9.

22 A. Yes. I see page 3-9 is devoted to playlists,
23 among other things.

24 Q. And now if you go to the next page, 66, this, too,
25 is addressing playlist modification, right?

1 A. Yes.

2 Q. And that was also included in your identification,
3 right?

4 A. Yes, it was.

5 Q. And what about if you jump to page 68? Do you see
6 the section that says "loading and playing a playlist"?

7 A. Yes.

8 Q. And did you direct the examiner to this portion of
9 the manual?

10 A. I did.

11 Q. Let's go forward to page 108. And do you see the
12 portion about the "N" button, at the top of the page?

13 A. The "end" button?

14 Q. "N," "N" as in "Nancy."

15 A. Oh, yes. "The next button (labeled N)," I see
16 that.

17 Q. And, sir, were you here at the trial when that's
18 what Apple identified as what they believe is the "skip"
19 button?

20 A. I was excluded from that part of the trial.

21 Q. Okay. But you did disclose this portion to the
22 PT0?

23 A. I did.

24 Q. And you identified it to the PT0?

25 A. I did.

1 Q. Sir, did you try and deceive in any way the PT0
2 about anything relating to the DAD manual?

3 A. No.

4 Q. And Mr. Stephens brought up the idea that you at
5 one point learned the PT0 did not -- it believed it did
6 not receive the DAD manual.

7 A. I did.

8 Q. And what did you do after learning this --

9 THE COURT: Believed they didn't receive it or
10 believed they weren't going to use it?

11 THE WITNESS: I'd received a notification from
12 the examiner indicating that he believed that it had not
13 been submitted. He sent a notification that said all of
14 the references that I had submitted had been considered
15 except two; and he had marked those out, saying that he
16 didn't get them.

17 When I got that, I went online and checked the
18 file history and found this artifact sheet, which
19 explained that, in fact, the Patent Office did get them
20 and it looked like the Patent Office got them but perhaps
21 the examiner never did. So, I called the examiner --

22 MR. STEPHENS: Objection, your Honor. This is
23 hearsay. I don't think he can testify about what the
24 examiner told him or any out-of-court statements of the
25 examiner.

1 THE COURT: Overruled. I'm going to find out
2 what he said as -- go ahead.

3 THE WITNESS: All right. Well, I told the
4 examiner, "You say you didn't get these two volumes and
5 you did get them and, you know, check the record."

6 And the examiner checked and indicated that
7 indeed they did have them.

8 BY MR. ARENZ:

9 Q. And did you have any other additional
10 conversations with the examiner on this issue?

11 A. I did.

12 Q. Please explain those.

13 A. Well, I -- my concern was that I had submitted
14 these and I wanted to get them considered and they were
15 not considered and the examiner had now passed the
16 application on to publication and he indicated there
17 wasn't anything he could do about it. Once it goes to
18 the publication branch, he essentially loses jurisdiction
19 over it and there wasn't any way that he could reel it
20 back in.

21 Q. How did you respond to that?

22 A. Well, I was disappointed.

23 Q. Did you have any additional communications with
24 the examiner on this issue?

25 A. Well, he said he was going to check with his

1 supervisor and see if there was anything he could do.
2 And either he called me back or I called him back and he
3 indicated he didn't think there was anything he could do
4 about this.

5 Q. Okay. Mr. Call, did you believe you had any
6 obligation at that time to try and stop the patent from
7 somehow issuing?

8 A. No.

9 MR. ARENZ: And, judge, I think I just need to
10 ask this question to make the record clear.

11 BY MR. ARENZ:

12 Q. Sir, when you answered questions at your 30(b)(6)
13 deposition, did you understand that you were answering on
14 behalf of Personal Audio, LLC, as an entity?

15 A. I did, and I thought I was probably the person
16 most knowledgeable to address those topics. So, you
17 know, if anybody would have had the answers, I think I
18 would have.

19 Q. And they would have been just about that entity
20 which was formed in April, 2009?

21 MR. STEPHENS: Objection, your Honor.
22 Objection. The notice was for the entity and its
23 predecessors. Mr. Call had personal knowledge --

24 THE COURT: I know what the notice said.

25 MR. STEPHENS: Okay.

1 BY MR. ARENZ:

2 Q. And, sir, so, my question was just that you
3 answered -- your understanding is that you answered on
4 behalf of the entity that was formed in 2009.

5 A. Yes. But, you know, I think my problem was with
6 specific questions and not my role.

7 Q. Sir, when did you -- from 2001 to 2005, did you
8 own an iPod?

9 A. I did not.

10 Q. And at that time did you serve as patent counsel
11 for the Logan Family Trust?

12 A. I was representing the trust with respect to these
13 applications that were pending in the Patent Office, and
14 I was handling the Patent Office work on those patent
15 applications.

16 Q. Did you have -- as part of your role as patent
17 attorney or for the trust, did you have any
18 responsibility for looking for potential infringers for
19 any of their patents?

20 A. No. I was not asked to do that.

21 Q. Did you have that responsibility for any of your
22 other clients in the 2001 to Two Thousand --

23 A. I don't recall ever investigating infringement for
24 clients.

25 Q. And from 2001 to 2006, did you have any interest

1 in the patents, in the '076 patent?

2 A. No. I was just an outside lawyer working by the
3 hour.

4 Q. Sir, do you have any access to Apple's proprietary
5 information?

6 A. No.

7 Q. Do you have any access to Apple's source code?

8 A. No.

9 MR. ARENZ: Your Honor, I pass the witness at
10 the moment.

11 MR. STEPHENS: Your Honor, I have a case on
12 the 30(b)(6) notice; but I have no more questions for
13 Mr. Call.

14 THE COURT: All right. What's the case?

15 MR. CORDELL: The case, your Honor -- and with
16 some trepidation to represent cases to the court that
17 I've just found while I was sitting here but with the
18 help of some of my partners.

19 It's a district court case out of Iowa; but
20 it's a very thorough opinion, *Engineered Products v*
21 *Donaldson Company*. It's 313 F.Supp.2d 951. And it's a
22 very, very thorough opinion, your Honor. It goes through
23 a host of pretrial issues, one of which was the degree to
24 which a patentee could go into issues relating to *laches*
25 wherein a privileged objection had been maintained, at

1 least in part. And the pin cites would be 1019 through
2 1023.

3 And again, your Honor, admittedly it's under
4 Eighth Circuit law and it's a district court opinion, but
5 it does appear to be very thorough.

6 THE COURT: All right. Who's -- any other
7 witnesses?

8 MR. STEPHENS: Yes, your Honor. Apple next
9 calls Mr. Logan, James Logan.

10 THE COURT: Okay.

11 MR. STEPHENS: Ms. Hunsaker will be examining.

12 THE COURT: And you recall you're still under
13 oath, sir?

14 THE WITNESS: Yes, sir.

15 MS. HUNSAKER: Your Honor, may I have just a
16 moment to hand out the binders?

17 DIRECT EXAMINATION OF JAMES LOGAN

18 CALLED ON BEHALF OF THE DEFENDANT

19 BY MS. HUNSAKER:

20 Q. Good afternoon, Mr. Logan.

21 A. Good afternoon.

22 Q. So, you and I have seen each other in court over
23 the last couple of weeks; but we haven't met before; is
24 that right?

25 A. Yes.

1 Q. Okay. Now, when is the first time that you ever
2 saw an iPod, whether in advertisement or in person or
3 otherwise?

4 A. It's hard to say. My most distant memory was
5 seeing a billboard in New York City sometime early in the
6 decade of the Two Thousands, but I couldn't tell you what
7 year that was.

8 Q. So, do you recall in your deposition testifying
9 that you're sure that you saw one in 2001?

10 A. I don't recall remembering that, but I might have
11 said that.

12 Q. Okay. When you did see the billboard that you
13 were referring to, what did you understand that billboard
14 to be?

15 A. It was a very nice ad. It was a silhouette and
16 somebody with some headphones. I was thinking that they
17 do a nice job with ads. I remember the "think different"
18 billboards that would catch my attention from time to
19 time and wondering why they forgot the L-Y, but it was
20 pretty effective, nevertheless.

21 MS. HUNSAKER: And, so, could I ask you to
22 please pull up DDX 501?

23 BY MS. HUNSAKER:

24 Q. And is this the silhouette ad that you were
25 referring to?

1 A. I remember a vertical aspect ratio, but it was
2 something similar.

3 Q. Okay. And just referring again to your memory of
4 when you would have first seen an advertisement for the
5 iPod, let me ask you to turn to your deposition which
6 should be in your notebook at page 224, beginning at
7 line 21.

8 A. Is that the white one?

9 Q. Yes. Yes, sir, it is.

10 A. I'm sorry. Could you say that page number again?

11 Q. Sure. It is page 224.

12 A. In my deposition?

13 Q. Yes. Beginning at line 21.

14 A. 224.

15 MS. HUNSAKER: Can we pull that up on the
16 screen, please? It's Mr. Logan's October 27th, Volume 1.

17 BY MS. HUNSAKER:

18 Q. Have you found the page and line, sir?

19 A. Yes.

20 Q. And Mr. Stephens asked you, "When is the first
21 time you ever saw an iPod, whether in an advertisement or
22 in person?"

23 And your answer was, "I am sure I saw one in
24 2001."

25 Did I read that correctly?

1 A. You did.

2 Q. And what did you understand that to be at the
3 time?

4 A. I'm sorry. What did I understand the iPod to be?

5 Q. Yes.

6 A. A music player.

7 Q. Did you understand it to be a portable device that
8 played music?

9 A. Yes.

10 Q. When did you first learn that iPods included
11 playlists of any kind?

12 A. I would have to say that was -- let me think here.
13 I think that was in early 2008.

14 Q. So, Mr. Logan, do you remember when you were
15 deposed in this case not remembering when you first
16 learned that the iPods included playlists of any kind?

17 A. I -- I'm sorry. Could you repeat the question?

18 Q. I understand it's a strange question.

19 A. Right.

20 Q. Do you remember not remembering in your deposition
21 when you first learned that iPods included playlists?

22 A. I do not remember not remembering.

23 Q. So, why don't we take a look at your deposition.

24 A. Okay.

25 Q. Volume 1 again, please, sir, at page 227, lines 8

1 through 18.

2 And the question was, "When did you first
3 learn that iPods included playlists of any kind?"

4 And your answer was, "I don't have memory of
5 that."

6 Do you see that?

7 A. I see that.

8 Q. And the next question was, "So, you're just not
9 sure when you first learned that?"

10 And the answer was, "I never even thought
11 about it, you know, played music, didn't concern me, and
12 I never thought about it, really."

13 Did I read that correctly?

14 A. You did, ma'am.

15 Q. And the next question was, "But you didn't know
16 when you learned about it? Could have been 2001, could
17 have been later?"

18 "Yeah, uh-huh."

19 Did I read that correctly?

20 A. You did.

21 Q. Mr. Logan, when Mr. Stephens took your deposition
22 last fall, in 2010, do you recall that he asked you a
23 number of questions about prototypes of the invention of
24 the '076 patent that you were working on back in the mid
25 1990s time frame?

1 A. I recall some questions in that area, yes.

2 Q. And do you recall Mr. Stephens asking you to
3 describe what you did to build your invention?

4 A. I don't remember that part of the deposition, no.

5 Q. So, if we could go to page 235 in Volume 1 of your
6 deposition.

7 A. Okay.

8 Q. And take a look at line 16 through 25 and actually
9 bridging to the next page on 236, through line 6.

10 Let me know when you've found that, please,
11 sir.

12 A. Okay.

13 Q. So, line 17, you were asked, "I'm asking you to
14 tell me what you did to build your invention, as you
15 understand it."

16 "Answer: What we did to build it?"

17 "Yes.

18 "You mean which steps we took along the way
19 and how far we got?

20 "Question: No, I mean what the device was
21 that you built."

22 "Answer: Well, to be quite frank, my memory
23 of what we actually built in the summer of '96 is not
24 that extensive. So, when I read Dan's deposition" --

25 And would that have been Mr. Goessling?

1 A. Yes.

2 Q. -- "it kind of reminded me how far we got. I had
3 forgotten about the notebook demo that we put together
4 with the visual basic software, for instance.

5 "So, most of what I'm telling you is I'm just
6 reciting what I kind of read in Dan's deposition."

7 Did I read that correctly?

8 A. You did.

9 Q. You also, during your deposition, discussed a
10 number of the Personal Audio business plans. Do you
11 recall that?

12 A. Yes.

13 Q. And Mr. Stephens examined you, asked you questions
14 about what Personal Audio was working on and what they
15 were trying to build and referenced some of those
16 business plans. Do you recall that?

17 A. Well, you're speaking of plural "business plans."
18 I don't recall if we went over different versions or not.
19 I forget that part.

20 Q. Well, do you recall Mr. Stephens asking you if
21 those business plans were the best source for what you
22 had in mind in those days for building the invention in
23 the '076 patent and telling him that there wasn't too
24 much more independently floating around in your memory?
25 Do you recall that?

1 A. I don't. You'd have to refresh my memory.

2 Q. Okay.

3 MS. HUNSAKER: So, why don't we pull up
4 Volume 1 again at page 56, lines 6 through 15.

5 BY MS. HUNSAKER:

6 Q. "Question: So, is the best source for what you
7 had in mind in those days the business plans?

8 "Answer: You know, I read the deposition that
9 you took of Dan Goessling. He seemed to have some pretty
10 good memories of what we were doing from a technical
11 perspective. Quite frankly, they were kind of better
12 than my recollections at the time.

13 "So, I don't think there's too much more
14 independently floating around in my memory of -- of
15 that."

16 Did I read that correctly, sir?

17 A. You did.

18 Q. Okay. I believe that some of the questions that
19 you were asked in your deposition also dealt with some of
20 the specifics about the product you were trying to bring
21 to market that would have been an embodiment of the
22 '076 patent. Do you recall that?

23 A. Again, if you could refresh my memory, that would
24 be helpful.

25 Q. Okay. Sure. Again, this is Volume 1 of your

1 deposition, on page 54, beginning at line 14 through the
2 bottom of the page.

3 A. Okay.

4 Q. So, why don't you go ahead and take a look at
5 line 14. The question was, "Now, what was the physical
6 structure of the player you were working on?"

7 A. Okay.

8 Q. And your answer was, "The physical structure of
9 the player we were working on. Can you be more specific?"

10 "Question: Well, I'm trying to be very
11 general, right. I mean, how big was it?"

12 "Answer: When you say 'working on it,' do you
13 mean our development system or what we are proposing to
14 bring to market?"

15 "What you were proposing to bring to market.

16 "Answer: I don't think we had -- I don't have
17 a memory of a definitive size and shape."

18 Do you see that?

19 A. I do.

20 Q. And then take a look at page 55, lines 11 through
21 13.

22 A. Yes.

23 Q. And Mr. Stephens asked you, "And what was the form
24 that you had in mind?"

25 "Answer: I don't recall, quite frankly. I

1 mean, obviously smaller is better, cheaper is better."

2 Do you see that?

3 A. Yes.

4 Q. So, is it fair to say that you have a hard time
5 today remembering what products you were working on, what
6 the details of the embodiments of the '076 patent were at
7 the time the alleged invention in this case was made?

8 A. Well, you know, in intervening months since I did
9 this deposition and now I've reviewed a lot of documents
10 and, so, some of my memories have been refreshed and
11 sometimes I get confused with what my original memories
12 and what I've read, et cetera. So, my memory is not
13 always perfect but --

14 Q. It's hard to remember --

15 A. It seems to change so -- you know, as I review
16 things and learn new things and -- but I digress; so, I
17 apologize.

18 Q. Just a few more of these. I promise.

19 A. Okay.

20 Q. Okay. Now, you recall, sitting through the trial,
21 that there was testimony regarding claim 13 of the
22 '178 patent, right?

23 A. Yes.

24 Q. So, Mr. Logan, did you ever build anything that
25 generated personalized content on the way the user had

1 listened -- based on what the user had already listened
2 to?

3 A. Like I said, I don't know how far we got in our
4 experiments. You know, if we did something along those
5 lines, it would have been an experiment; but I can't
6 recall.

7 Q. And did you ever --

8 THE COURT: Could I ask Ms. Hunsaker what -- I
9 think you're going on *laches*, right?

10 MS. HUNSAKER: Yes, your Honor.

11 THE COURT: Okay. Let's say he built a
12 working iPod and just forgot to market it. Or let's say
13 he built nothing. Under what element of *laches* does that
14 fall?

15 MS. HUNSAKER: Well, under the element of
16 *laches*, we're looking at evidentiary prejudice, your
17 Honor.

18 THE COURT: The inability to find from him the
19 things that he had built?

20 MS. HUNSAKER: We would be looking for
21 embodiments of the invention, whether the ideas were
22 fully conceptualized, whether they were reduced to
23 practice, whether he was diligent in reducing them to
24 practice.

25 THE COURT: But aren't you talking about time

1 after the application was filed?

2 MS. HUNSAKER: I believe the time frame in
3 which the questions were being asked were around 1996,
4 with respect to the Personal Audio business plans.

5 THE COURT: But at one time there was a
6 discussion or a thought that the date of the invention
7 might be important, but I don't recall any prior art
8 being blocked out on that basis since all of your prior
9 art was more than a year prior to the filing of the
10 application. So, what you're talking about, I think,
11 would be -- if this was a case where it turned out that
12 conception, date of invention, a week here or a month
13 there was important -- help me out. Let's assume that
14 had he filed it earlier, he might have had one of those
15 devices and it might have been built, say, a month before
16 the filing deadline. How does that help you when
17 you're -- I mean, was there a piece of art that was kept
18 out on the -- where is the prejudice?

19 MS. HUNSAKER: Well -- so, your Honor, I think
20 in addition to the invention date -- and I understand
21 your Honor's point, but I believe that it's also relevant
22 to whether Mr. Logan invented what he claims to have
23 invented.

24 We have passed the point of having 112
25 defenses and we think that whether he had this

1 evidence -- or whether he had these embodiments at the
2 time in 1996 would help demonstrate whether --

3 THE COURT: But the thing is that we know -- I
4 mean, if you had someone running around saying -- and
5 I've had cases like this -- "Wait a minute. Logan and I
6 worked together. I'm the inventor. Why isn't he sharing
7 with me," that would be important. I'm just trying to
8 get -- I mean, I understand your line of questioning
9 which would be very appropriate in certain fact
10 situations; but right now we're dealing with patent
11 applications filed in October of 1996. You've got in
12 plenty of -- you know, your prior art that was available
13 more than a year earlier. No one has come forward and
14 said, "I'm a co-inventor" or "He stole from me." I
15 haven't seen anything like that.

16 So, assume for the moment I'm convinced that,
17 yes, they had -- in fact, I think he stated in here they
18 did something on a laptop and he was running around in
19 his car trying to see what it would be like, hopefully
20 not driving off the road while he was playing with his
21 laptop, based on his deposition that I've read here.
22 Where do you get?

23 MS. HUNSAKER: So, I mean, I think all of the
24 circumstances around the invention, what he was building
25 at the time are relevant particularly to 112 defenses in

1 addition to the prior art defenses. So, we --

2 THE COURT: But aren't we dealing with *laches*
3 right now?

4 MS. HUNSAKER: We are, your Honor. But, for
5 example, a best mode defense could depend in large part
6 on what embodiments the inventor was working on, what he
7 knew to be the best mode; and we were not able to explore
8 any of that without evidence in this case about what he
9 was working on. And the reason we didn't have that
10 evidence is because of the passage of time and the lack
11 of memory of the witness.

12 THE COURT: Okay. So, if he had -- your
13 theory would be if he had built a 3-inch by 4-inch pocket
14 device with a battery that lasted ten hours and held a
15 thousand songs back in 1996 and then lost it somehow or
16 carelessly threw it away or didn't recognize what he had
17 and he merely described in his patent what you've claimed
18 to be something that works with a laptop computer or a
19 regular computer, you would have been able to show that
20 he didn't describe the best mode. Is that --

21 MS. HUNSAKER: So, I can't profess that it
22 would have come out exactly like that; but yes, your
23 Honor. I mean, we don't -- the bottom line is we don't
24 know what he considered the best mode.

25 THE COURT: Okay. All right. Go ahead.

1 BY MS. HUNSAKER:

2 Q. So, Mr. Logan, did you ever build a system that
3 downloaded a playlist?

4 A. I don't remember.

5 Q. Did you ever build a system that could play a
6 playlist?

7 A. I believe we had that on a prototype.

8 Q. So, let's just take a look at your deposition.
9 This is at Volume 1, page 238, and lines 6 through 10,
10 please, sir.

11 So, you were asked, "Did you ever build a
12 system that could play a playlist?"

13 And your answer -- if you could read that,
14 please, on lines 8 to 10.

15 A. Okay.

16 Q. If you could read it out loud, sir, please.

17 A. Oh, okay. "Again, I do not recall that. I don't
18 remember the prototype that we had in enough detail to
19 answer that."

20 But what I'm thinking now I think for the
21 first time is I do remember we were using the "skip"
22 button; so, we must have had a playlist of some sort to
23 skip to something. So, I don't think -- I think my
24 answer now is perhaps a bit more accurate.

25 Yeah. I say that in line 14 actually, where

1 it says, "Did you build a system that would skip forward
2 and backwards?"

3 And I said, "I'm pretty sure that we did
4 that."

5 So, now, you know, I'm a bit more familiar
6 with playlists and so forth; and, so, I guess what I'm
7 saying is we would have had to have a playlist to have
8 been able to do that.

9 Q. And then you were asked, at line 19, "But you
10 don't know whether it was skipping forward in a playlist
11 or not?"

12 And your answer was, "Yes, I couldn't tell
13 you."

14 Do you see that?

15 A. All right. Let me read this here.

16 Yeah. I guess at that point I wasn't thinking
17 in terms of playlists, I guess.

18 Q. So, Mr. Logan, we've had a lot of testimony in
19 this trial about value of the patents-in-suit. Did you
20 have documents at some time that reflected communications
21 with the investigators concerning Personal Audio?

22 A. Did I have documents with investors concerning --
23 I'm sorry. Could you repeat that?

24 Q. Yeah. Did you at some point in time have
25 documents that reflected communications with angel

1 investors concerning Personal Audio?

2 A. We never had any angel investors in Personal
3 Audio.

4 Q. So, do you recall -- let's take a look at your
5 deposition at page 63, lines 11 through 14.

6 And the question was, "Is it possible that you
7 once had documents that reflected communications with
8 angel investors concerning Personal Audio?"

9 And your answer was, "Yes, I'm sure I did."

10 Did I read that correctly?

11 A. You did.

12 Q. And then if you go on down, you were asked, "When
13 do you think that those documents were destroyed?"

14 And your answer was, "Well, I'm not sure how
15 long they were ever saved for. I would have no way of
16 answering that."

17 And then Mr. Stephens asked you, "So, you just
18 don't know when you ceased to have them?"

19 And your answer was, "Right, that's true."

20 Do you see that?

21 A. Yes.

22 Q. And then a little bit further down, Mr. Stephens
23 was asking you a little bit more about how long ago it
24 was that you would have had those materials and
25 specifically at lines -- starting at line 4, Mr. Stephens

1 asked you when that was.

2 And at lines 9 and 10 you said, "But for all I
3 know, I threw stuff out along the way, too. I don't
4 remember."

5 A. I see that.

6 Q. Mr. Logan, what was your net worth in 2001?

7 A. I don't remember exactly.

8 Q. So, could you take a look at Volume 2 of your
9 deposition on page 307?

10 A. Okay.

11 THE COURT: Could you hold up just one second?

12 Let me make a note.

13 BY MS. HUNSAKER:

14 Q. I'm sorry, Mr. Logan.

15 MR. MORTON: One second. I was waiting for --

16 THE COURT: Could you hold up one second?

17 MS. HUNSAKER: Oh, yes. I'm sorry.

18 THE COURT: You've made a point. I want to
19 make a note so I can remember the point that you've made.

20 MS. HUNSAKER: Okay.

21 THE COURT: This is actually working to your
22 benefit.

23 MS. HUNSAKER: Okay. I -- yes. Sorry, your
24 Honor.

25 THE COURT: Okay. So, Mr. Morton, do you have

1 an objection?

2 MR. MORTON: Yes, your Honor. I have an
3 objection based on relevance to the question about
4 Mr. Logan's net worth.

5 THE COURT: I'm sorry. Relevance as to his
6 memory?

7 MR. MORTON: No, as to just inquiring about
8 his net worth in 2001. It's not relevant.

9 THE COURT: And the relevance would be?

10 MS. HUNSAKER: Whether he was capable of
11 bringing suit or not, your Honor.

12 THE WITNESS: I didn't own the patents in
13 2001.

14 THE COURT: Were you financially capable of
15 bringing suit in 2001?

16 THE WITNESS: They weren't my assets in 2001.

17 THE COURT: No, no. If you wanted to bring
18 suit in 2001, could you have done it?

19 THE WITNESS: Well, given what I know about
20 what a lawsuit costs today, if I had that knowledge back
21 then, the answer would have been no. So, if I had done
22 the proper research, I wouldn't have brought suit.

23 THE COURT: Okay. Why don't you go on to your
24 next question. I'll sustain any -- the relevance
25 objection as to any further pushing on his net worth at

1 that time.

2 MS. HUNSAKER: Okay.

3 BY MS. HUNSAKER:

4 Q. So, you testified on direct examination in this
5 case about an agreement with Motorola. Do you recall
6 that?

7 A. I do.

8 Q. And specifically that related to the Pause patent;
9 is that right?

10 A. Yes.

11 Q. And you testified that that involved a
12 6-million-dollar investment and a 15-cent running
13 royalty; is that right?

14 A. I believe so.

15 Q. And that Motorola agreement was not produced to
16 Apple in this case; is that right?

17 A. I don't know if it was or wasn't.

18 Q. Have you seen that agreement as an exhibit in this
19 case?

20 A. I don't recall seeing it, no.

21 Q. Have you seen it in preparing for your testimony
22 in this case?

23 A. I don't recall seeing it, no.

24 Q. Do you know where it is now?

25 A. I don't exactly, no. I assume Gotuit has that or

1 I might someplace. I don't know where it is.

2 Q. So, in this case you're seeking a 90-cent per-unit
3 royalty; is that right?

4 A. I believe so.

5 Q. And the running royalty that you testified on
6 direct examination in the trial from the Motorola
7 agreement was a 15-cent running royalty; is that right?

8 A. Well, it gets a bit complicated. The \$6 million
9 was actually sort of prepayment, if I recall this
10 correctly, on X number of units. I think the rate might
11 have been 50 cents or something. I don't remember
12 exactly; but there was some, you know, formula for how
13 they came up with the 6 million and so forth.

14 Q. So, your previous testimony was that it was a
15 20 percent investment in the company. Wasn't that what
16 the 6 million was for?

17 A. They got stock in the company as well as a prepaid
18 license for a certain number of units or something and
19 then there was this residual of 15 cents a unit that was
20 on top of that, but I forget how it all rolled up. There
21 were several layers to it.

22 Q. And we can't verify any of this because you don't
23 know where that agreement is; is that right?

24 A. It was -- I was not asked to produce it.

25 Q. So, Robins Kaplan didn't ask you to search for

1 that document?

2 A. I -- I mean, I produced everything I was asked
3 for; so, I can't speak to, you know, if it was on the
4 list or not. I mean, if it was, I would have given it to
5 them. I was asked to produce a lot of documents; and,
6 you know, there were a lot of things that I produced.

7 Q. But do you have a specific recollection of being
8 asked to produce the Motorola agreement?

9 A. I don't have a specific recollection of that one
10 item, no.

11 Q. But you were asked that question by Mr. Schutz on
12 direct examination.

13 A. I don't -- I don't recall.

14 Q. So, do you know where it is?

15 A. Do I know where the original Motorola Pause
16 document is?

17 Q. Yes.

18 A. I don't know exactly where it is off the top of my
19 head. I know some places to go look.

20 Q. You know some places to go look, and you haven't
21 gone and looked in those places before this trial?

22 A. I don't believe so.

23 Q. And the per-unit running royalty in that agreement
24 you testified is 75 cents less than the per-unit royalty
25 that you're seeking in this case; is that right?

1 A. Depending on how you account for the \$6 million.

2 Q. But the per-unit running royalty that you
3 testified was in that agreement that has not been
4 produced or searched for was 75 cents less than the
5 per-unit royalty you're seeking in this case; is that
6 right?

7 A. I think that's an inaccurate way to represent the
8 agreements because you're not accounting for the
9 \$6 million.

10 Q. But we don't know that because we don't have the
11 agreement; is that right?

12 A. I don't know that because I haven't looked at the
13 agreement in a number of years; so, I can't recall the
14 specific details.

15 THE COURT: Okay. We're going to take a break
16 until 3:00. Ms. Hunsaker, if you could provide
17 Ms. Mullendore with the citation to the direct testimony
18 where this came up, that would be helpful so I can go
19 back and take a look at it.

20 MS. HUNSAKER: Yes, your Honor. I have that
21 now if you'd like it.

22 THE COURT: Oh, okay. Sure. What page of the
23 transcript?

24 MS. HUNSAKER: So, this is in Volume 2 of the
25 transcript, which is page 392.

1 THE COURT: Okay. I'll take a look at that.

2 MS. HUNSAKER: And page 7, all the way
3 through --

4 THE COURT: Wait a minute. Wait a minute.
5 Page 7 through 392?

6 MS. HUNSAKER: Oh, I apologize, your Honor. I
7 apologize. If I could start over, I'll get it right this
8 time.

9 Page 392, line 7, through page 394, line 13.

10 THE COURT: Okay. That, I can look at.

11 MS. HUNSAKER: Okay. I apologize for that.

12 THE COURT: We'll be in recess.

13 (Recess, 2:47 p.m. to 3:04 p.m.)

14 (Open court, all parties present, jury not
15 present.)

16 THE COURT: Go ahead.

17 MR. MORTON: Your Honor, if I could, I'd like
18 to point out a couple of things about a citation that was
19 provided on this Motorola license before the break.

20 First of all, your Honor, that was -- the
21 citation to page 393 of the transcript is actually to the
22 redirect. That's not something that was elicited on
23 direct. It was in response to Mr. Logan essentially
24 being attacked as a failure in business and in the Pause
25 litigation and, so, that's when that testimony came out.

1 And, of course, that also is not a Personal
2 Audio document. That would come from Motorola or from
3 another entity, but that's -- this questioning about
4 whether he was asked to produce that document, I think,
5 was not proper. And this is also something that's never
6 been raised before as far as the *laches* defense.

7 THE COURT: All right. And your point is that
8 because you brought it out -- or I guess Mr. Schutz
9 brought it out on redirect -- I shouldn't consider it?

10 MR. MORTON: Well, this is -- I mean, this
11 agreement -- I think both sides have been opposed to it
12 and we haven't said we wanted to rely on it and did not
13 offer that in direct testimony.

14 But when he gets attacked as being a
15 failure --

16 THE COURT: Okay. But when you say both sides
17 were opposed to it, help me out with all those motions *in*
18 *limine* and objections. Did both sides file objections to
19 it earlier or...

20 MR. SCHUTZ: Your Honor, if I may jump in
21 here.

22 THE COURT: Sure.

23 MR. SCHUTZ: There seems to be an indication
24 that somehow they are prejudiced by failure to produce
25 the Motorola license.

1 THE COURT: That's what they're saying all
2 right. Sure.

3 MR. SCHUTZ: I know, but our expert never
4 relied on the Motorola license. We never solicited it in
5 direct examination. I never argued it in closing. It
6 was only after Mr. Logan was repeatedly attacked as being
7 everything from a tax cheat to somebody who destroys
8 documents to being a failed businessman to not being able
9 to put a company together --

10 THE COURT: Okay. But the point she's trying
11 to make, I think -- and you can correct me if I'm wrong,
12 Ms. Hunsaker -- is if they had this agreement and
13 document, which I guess the point they're trying to make
14 is it no longer exists -- their expert would have been
15 able to hammer on "Here we have a 15-cent royalty and you
16 want a 90-cent royalty and 15 cents is" -- you asked
17 several questions on this. 15 cents is less than
18 90 cents, and I'll take judicial notice of that.

19 MR. SCHUTZ: But these patents -- the Pause
20 patent is not in the Personal Audio family. It doesn't
21 relate to this technology at all. Again, nobody sought
22 to rely on this document or this technology. So, for
23 them to argue that there is somehow evidence prejudice
24 because the license with Motorola was not produced is
25 simply a spurious argument, your Honor; and that's the

1 only thing I'm trying to -- only point I'm trying to
2 drive home.

3 THE COURT: Well, she's allowed to try to
4 develop -- I mean, I'll take arguments; but to save a
5 little time, Ms. Hunsaker, okay, they didn't -- am I
6 correct that that's your reason to try to get in the --
7 or find out where this document is? Or do you have --
8 was there some other reason since it came up on --
9 earlier in the testimony?

10 MS. HUNSAKER: Well, your Honor, to be honest,
11 having never seen the document, I had no idea that it was
12 going to come up in Mr. Logan's testimony. And if
13 your Honor could look at page 394, line 7 of the
14 transcript, Mr. Schutz specifically, after Mr. Logan
15 testified to the 6-million-dollar investment and -- of
16 Motorola, Mr. Schutz asked, "Was there some additional
17 consideration in that agreement for the Pause patent?"

18 And Mr. Logan said, "There was."

19 And he said, "What was that?"

20 And Mr. Logan said, "We wanted to participate
21 in the upside in case they sold a ton of these and we
22 were given a 15 cent per-unit royalty on each unit sold."

23 So, it seems very clear from the record that
24 Mr. Schutz was eliciting testimony about a running
25 royalty to support the form of royalty in this case. We

1 agree that their expert did not rely on that. We agree
2 that Dr. Ugone did not rely on that. However, the reason
3 for that is because the document was not produced.

4 MR. SCHUTZ: I'll also note that this --

5 THE COURT: Wait. Wait. I'm reading through
6 the testimony here. When this came up, I don't see an
7 objection from Apple as to this wasn't produced or -- I
8 mean, the objections that are made are outside the scope.
9 I didn't ask anything about agreements.

10 And then I overruled that.

11 There was an objection that he is now giving
12 us testimony about what Motorola was thinking. I
13 sustained that.

14 I'm going to object to the narrative. We need
15 a specific question. I sustained that.

16 Objection as to compound question. I
17 overruled that one.

18 And then Mr. Schutz asked about the agreement,
19 and he starts going into the agreement. No hearsay
20 objection, no "he's testifying about something that
21 wasn't produced in violation of the court order"
22 objection.

23 I mean, I've got to say whatever testimony it
24 was, while I could think of objections that might have
25 been raised, they weren't. So, it came in basically

1 without objection on any of the objections that might
2 have been sustained; so, it's there. And you've
3 established it wasn't previously produced.

4 In terms of *laches*, is it your point that you
5 think it wasn't produced because it no longer exists?

6 MS. HUNSAKER: Yes. There's no evidence of
7 it. It hasn't been produced. It hasn't been searched
8 for. It's evidence in the case that we don't have of an
9 agreement from some time ago that if this case was filed
10 earlier, we think we would have had discovery on.

11 THE COURT: Or alternatively you should be
12 asking for sanctions because they hid an agreement?

13 MS. HUNSAKER: Or alternatively that. Or at
14 least search for it.

15 MR. CORDELL: Your Honor, can I just add
16 one --

17 THE COURT: Well, that's -- because right now
18 we're talking about *laches*; and *laches*, there has to be a
19 showing that it didn't exist.

20 Yes, sir?

21 MR. CORDELL: Could I just add one point? I
22 hear what Mr. Schutz is saying; and reading this
23 transcript again, it brings it all back. That came out
24 of the clear-blue sky. It was clearly something that
25 Mr. Schutz and the witness had worked out to talk about

1 ahead of time, and this Motorola agreement was blurted
2 into the record when it was something that did surprise
3 me. I had never heard of it. I turned to the trial team
4 and said, "What is this agreement?" And they all looked
5 at me like I had two heads.

6 The reality is it wasn't. And then on
7 redirect it was the first question I asked him -- I guess
8 at page 408, at the bottom. And I specifically asked
9 him, I said, "You never produced that."

10 And he said, "Well, I don't know."

11 But I think he did know. I think that he and
12 Mr. Schutz talked about this and I think he knew that it
13 wasn't produced and they decided to go ahead and blurt it
14 out. So --

15 THE COURT: Okay. But keep in mind that's a
16 different issue than *laches*. I mean, let's keep our
17 issues straight here. That's a different issue than the
18 *laches* issue. The *laches* issue is the delay caused this
19 unavailability, as opposed to secret nefarious deals
20 between counsel and witness caused it. And, so, I need
21 to keep these two theories separate because it's
22 different.

23 MS. HUNSAKER: And if I can say, your Honor,
24 you know, they say don't ask questions you don't know the
25 answer to on cross-examination. I don't know the answer

1 to these questions. We haven't had the opportunity to
2 examine Mr. Logan. So, when I asked Mr. Logan if he
3 knows where this document is or if he can't find it or if
4 he's tried, I'm asking that because we haven't had
5 discovery on this and because this is really the first
6 time we've heard of it.

7 MR. SCHUTZ: Your Honor, I'm looking at the
8 concordance for his deposition. Motorola is --

9 THE COURT: All right. What page of the
10 deposition are you --

11 MR. SCHUTZ: Well, it's his Deposition
12 Volume 2; and I'm just looking at the word index. I see
13 "Motorola" in the word index appears at pages 288, 293,
14 295 --

15 THE COURT: Well, let's --

16 MS. HUNSAKER: And I looked at that after his
17 trial testimony, and what does not appear is a 15-cent
18 running royalty.

19 THE COURT: Okay. Why don't we continue on
20 right now with the *laches* and inequitable conduct portion
21 and let me suggest that counsel for both sides look at
22 this deposition and if there is some motion that needs to
23 be filed based on some failure to disclose or some
24 reasons that it wasn't disclosed or whatever, I can deal
25 with that separately.

1 I haven't heard evidence yet that the document
2 is missing because it no longer exists. It sounds like
3 nobody looked for it yet.

4 Now, it may turn out it's missing because it
5 doesn't exist or it may turn out that it was improperly
6 not disclosed or it may turn out something else. But
7 right now let me focus on the *laches* part of it. Okay?

8 MS. HUNSAKER: Yes, your Honor.

9 BY MS. HUNSAKER:

10 Q. So, Mr. Logan, do you recall on direct exam in
11 your testimony in this case Mr. Schutz introduced some
12 Made for iPod licenses? Do you recall that?

13 A. Yes.

14 MS. HUNSAKER: And for the record, those were
15 Plaintiff's Exhibits 10 through 13.

16 BY MS. HUNSAKER:

17 Q. And do you recall in your testimony, when those
18 exhibits were admitted, that the exhibits plaintiffs put
19 into evidence were not signed by you?

20 A. Yes. I know they were not signed by me.

21 Q. And you were here during closing arguments, and
22 you heard Mr. Schutz reference the 50 cents from those
23 agreements. Do you recall that?

24 A. I don't remember specifically. I know he
25 mentioned those licenses. I don't recall exactly what he

1 was saying about that.

2 Q. It was something like "When it's Apple on the
3 other side of the table, they demand" --

4 THE COURT: It's a running royalty. I don't
5 think he said 50 cents. I think he said it's a running
6 royalty, not a lump.

7 MS. HUNSAKER: Thank you, your Honor.

8 THE COURT: He probably tried to slip in it's
9 15 -- or a thousand dollars, was what he was thinking of
10 doing; but he didn't. And so --

11 You were thinking of that, weren't you,
12 Mr. Schutz?

13 MR. SCHUTZ: Your Honor, I was very --

14 MR. GERMER: Attorney-client privilege.

15 THE COURT: Never mind. I won't pin you on
16 that one.

17 BY MS. HUNSAKER:

18 Q. So, the Made for iPod license exhibits,
19 Plaintiff's Exhibit 10 through 13, those did not come
20 into your hands until late last fall, is that correct,
21 Mr. Logan?

22 A. That's true.

23 Q. So, had the suit been brought earlier, those
24 exhibits wouldn't have existed at all; is that right?

25 A. Yes.

1 Q. Were you -- did you travel to Lufkin last October,
2 Mr. Logan?

3 A. I did not.

4 Q. Have you heard of a case called *Affinity*?

5 A. I have heard of it in this trial a few days ago,
6 yeah.

7 Q. *Affinity versus Volkswagen*?

8 A. Yes.

9 Q. And are you aware that Made for iPod license was
10 discussed in that case?

11 THE COURT: Wait a minute, Ms. Hunsaker.
12 Isn't that kind of like saying prejudice because if you
13 had just filed the suit earlier before *KSM* came out, we
14 could have had a different -- or before the Supreme Court
15 made its latest ruling or before -- I mean, that's almost
16 like, "Gee, if we had just gotten this over earlier, we
17 would have had a better law on our side."

18 MS. HUNSAKER: I understand your point, your
19 Honor, and if you could just give me a little bit of
20 leeway on this.

21 THE COURT: Okay.

22 BY MS. HUNSAKER:

23 Q. So --

24 THE COURT: Well, I'm just bringing it up
25 because your time is running.

1 MS. HUNSAKER: Okay. All right. I'll move
2 more quickly, then.

3 BY MS. HUNSAKER:

4 Q. So, you signed up for the Made for iPod program on
5 about October 18th of 2010. Does that sound about right?

6 A. So, are you asking me if I signed those documents
7 also?

8 Q. I'm going to ask you that.

9 A. Well, you were saying I --

10 Q. Did you --

11 A. I think your question implied I had signed the
12 documents.

13 Q. Have you signed a version of those documents?

14 A. I countersigned the documents that were sent to
15 me, yes.

16 Q. Okay. And prior to signing those documents, you
17 applied for the Made for iPod program around
18 October 18th, 2010. Does that sound right?

19 A. Well, I think we should get straight what entities
20 we're speaking of. So, there's a company called "Bringrr
21 Systems"; and Bringrr Systems went through -- or tried to
22 go through that approval process. So, just to get the
23 record straight on that.

24 Q. Right. And we heard some testimony about that in
25 your direct testimony in this case, right?

1 A. I forget if we discussed that or not. I'm sorry.

2 Q. Okay. Okay. Fair enough.

3 So, the program that you signed up for late in
4 the fall of 2010, you testified you did receive that
5 contract from Apple and you did sign that, correct?

6 A. I signed it on behalf of Bringrr Systems, yes.

7 Q. Okay. And that signed version was not marked as
8 an exhibit or introduced in this case; is that right?

9 A. Yes. That was my mistake. I turned over the
10 earlier set that was just signed by Apple.

11 Q. And when did you turn that over?

12 A. I don't know. A couple weeks ago or something.
13 It was -- I'm not sure exactly when.

14 Q. But you applied for it back in October of 2010?

15 A. Yes.

16 Q. And that's when you would have --

17 A. I don't know if it was October. It was late in
18 the year.

19 Q. Okay. And that's approximately when you would
20 have gotten the versions that are marked as an exhibit in
21 this case?

22 A. I'm not sure when they signed them and sent them
23 back.

24 Q. Okay. Okay. Does it sound like generally the
25 right time frame? I'm not off by a year?

1 A. Right. We were going back and forth last fall.

2 Q. Okay. So, last fall of 2010 was when these
3 documents came in existence?

4 A. Right.

5 Q. And last fall of 2010 was when you turned them
6 over to your counsel, or you turned them over more
7 recently?

8 A. I think it was more recently.

9 Q. Like in May of 2011?

10 A. Potentially. I forget exactly.

11 Q. So, would it surprise you if those were produced
12 to us on May 11th of 2011?

13 A. Would it surprise me if that was the date?

14 Q. Yes.

15 A. Not too much, no.

16 Q. And do you know why the signed versions were not
17 provided?

18 A. Because I had at that point kind of given up on
19 trying to figure out what all the paperwork meant without
20 having a legal budget at Bringrr and I decided to abandon
21 the program and I never labeled the files properly. So,
22 I just threw them onto my computer without a label; and
23 the ones I had labeled were the ones that were just
24 signed by Apple. And, so, when somebody asked me for
25 those papers, I gave the ones that had the label.

1 Q. Okay. Now, you said that you applied for those
2 under the Bringrr entity; is that right?

3 A. Yes.

4 Q. Now, you -- and we're talking about the Made for
5 iPod licenses that are at Plaintiff's Exhibits 10 through
6 13. You've not actually participated in the Made for
7 iPod program since signing up for that in the fall of
8 2010; is that correct?

9 A. I have no idea what my legal standing is with
10 those contracts.

11 MR. MORTON: Your Honor, I --

12 A. I got an email from them recently telling me about
13 something.

14 THE COURT: Wait. Wait. Let's hear the
15 objection.

16 MR. MORTON: I know your Honor said there
17 would be some leeway on this; but I just don't understand
18 where this is going and how it's relevant to the *laches*
19 trial, your Honor.

20 THE COURT: Overruled. We'll take care of
21 that with the time limits.

22 BY MS. HUNSAKER:

23 Q. Have you paid any royalties to Apple under the
24 Made for iPod license that you signed up for for Bringrr
25 in November of 2010?

1 A. I don't believe so. I tried to get a woman on the
2 phone to ask some questions and I was never able to get
3 anybody on the phone and we just gave up trying to offer
4 an Apple product.

5 Q. Mr. Logan, how did you hear about the Made for
6 iPod program?

7 THE COURT: Okay. Ma'am, look, how does this
8 deal with *Laches*? If you're trying to go into something
9 else, fine; but tell me what it is you're trying to go
10 into.

11 MS. HUNSAKER: So --

12 THE COURT: *Laches* has to do with delay six
13 years ago.

14 MS. HUNSAKER: So, your Honor, the program
15 that Mr. Logan signed up for well into this case and
16 shortly before this trial and for which the exhibits have
17 been admitted into evidence in this case, Mr. Logan has
18 not actually participated in that program or paid any
19 royalties under that program and the evidence that is in
20 the case did not exist if the case had been brought
21 earlier.

22 THE COURT: Okay.

23 MS. HUNSAKER: I was actually at the end of my
24 questioning on this --

25 THE COURT: All right. All right.

1 MS. HUNSAKER: -- and was about to pass the
2 witness.

3 THE COURT: Let's just be real clear for the
4 record.

5 It's almost absurd, on its face, for modern
6 businesspeople to say that they have never heard of or
7 would never consider a lump-sum royalty or a running
8 royalty or anything else. I mean, even if they are just
9 complete computer people and never went past high school,
10 at the level of something like Apple, they've got MBAs
11 there who are aware of all kinds of royalty and license
12 agreements and if the right case came along, they would
13 do what it takes to get what they want.

14 The idea of coming in and saying, "Oh, we've
15 never heard of these things. We'd never consider these
16 things. We'd never do these things" -- once you open the
17 door with that kind of testimony, you're almost begging
18 for a limited purpose. Now, I've instructed the jury
19 that those were not comparable licenses so they don't
20 take it that way; but the idea that someone has never
21 heard of or never knew about or would never consider any
22 kind of a license is almost unbelievable on its face.

23 And, again, the idea that if this suit had
24 just been filed earlier, we would have had a different
25 Congress and the law would have been different or more

1 people would have been using -- I mean, that's kind of
2 like saying, "Gee, if they had just filed it earlier,
3 they wouldn't have gotten that last year of damages
4 because we wouldn't have sold those iPods." That, I
5 don't think, is a proper showing of prejudice. Maybe a
6 higher court will say different; but to me, that's not
7 evidentiary prejudice.

8 Now, you've brought up several more standard
9 items; and if you have more of those, those would be the
10 ones to go into. But the fact that facts would have
11 changed over time and new events would have been
12 developed -- I mean, would you argue, for example, if --
13 I don't know -- Steve Jobs retired and Beyoncé took over
14 the company and -- or something like that and because
15 it's now a different witness *[sic]* people didn't like you
16 as much or whatever? Maybe if she took over, they would
17 like you better. I don't know.

18 I mean, facts change over time; but that's not
19 evidentiary prejudice. So, I mean, I'll give you some
20 more leeway; but I'm not seeing where we're going on
21 things that happened in the last year to 18 months.

22 MS. HUNSAKER: So, I was actually at the end
23 of my examination --

24 THE COURT: Okay.

25 MS. HUNSAKER: -- and ready to pass the

1 witness, your Honor.

2 THE COURT: All right.

3 MS. HUNSAKER: Thank you.

4 CROSS-EXAMINATION OF JAMES LOGAN

5 BY MR. MORTON:

6 Q. Good afternoon, Mr. Logan.

7 A. Good afternoon.

8 Q. Remind us again. Who owned the '076 patent and
9 the application that led to the '178 patent from 2001
10 through early 2009?

11 A. That would have been the Logan Family Trust.

12 Q. And I'm going to show you a document, Mr. Logan,
13 that's been marked Defendant's Exhibit 153. Can you tell
14 us what that document is?

15 A. That is the -- one of the earlier agreements.

16 Can you blow it up a bit?

17 Q. Sure. Sure.

18 A. Thank you.

19 Yeah. That's one of the agreements that the
20 trust made with Charlie Call and myself to become engaged
21 with monetizing these patents.

22 Q. And what's the date on that agreement, sir?

23 A. That is August 9th, 2007.

24 Q. And is that the first time that you had a
25 contractual obligation with the trust related to the

1 '076 patent?

2 A. Yes.

3 Q. And at that point in time, did you get some
4 interest in the patents? Not ownership but an interest
5 in the patents.

6 A. You mean previous to 2007?

7 Q. No. I mean at this -- in this agreement.

8 A. I'm sorry. Could you repeat that? Oh, you're
9 asking if I got an interest in the patents at that point?

10 Q. Yes.

11 A. Yes. That is true.

12 Q. And from 2001 up until this agreement, did you
13 have a financial interest in the patents-in-suit?

14 A. I did not, no.

15 Q. Then I want to go back and ask you some more about
16 your own personal knowledge, starting back in 2001.

17 Did you know or believe in 2001 that the iPod
18 may infringe the '076 patent?

19 A. I did not.

20 Q. How about 2002?

21 A. No.

22 Q. How about 2003?

23 A. No.

24 Q. How about 2004?

25 A. No.

1 Q. And how about 2005?

2 A. No.

3 Q. All right. And I think you -- that's enough
4 years. Thank you, Mr. Logan.

5 Did you own an iPod when Apple released it in
6 2001?

7 A. I did not.

8 Q. When did you first own an iPod?

9 A. I've never actually owned an iPod.

10 Q. Why is that, sir?

11 A. I have pretty simple music taste actually and I
12 just only listen to music when I'm in my car and I really
13 just listen to radio music, to be quite frank.

14 Q. Okay. So, when did you actually first hold an
15 iPod, the actual device, in your hand?

16 A. Well, the -- believe it or not, the only time I
17 can remember ever holding an iPod is when my wife bought
18 one in 2005 and I was very curious about that capacity of
19 the touch wheel product because I was in the capacitive
20 touchscreen business earlier and just wanted to see that
21 work and I played with it for a minute to see what that
22 felt like basically and that was about it. You know, she
23 complained that she had misplaced it around the house a
24 couple times but I don't think I was ever the one to find
25 it and, like I said, I never really -- I've never even

1 listened to one, to be quite frank.

2 Q. So, from 2001 to 2004, you had never touched or
3 used an iPod?

4 A. Not that I can recall.

5 Q. Had the iPod really gained in popularity by 2005
6 when you first actually saw one?

7 A. Yes. It was starting to become a pretty
8 mainstream product by that point.

9 Q. All right. Let's switch topics a little bit and
10 talk about what you were doing in 2001. Were you working
11 on Personal Audio products in 2001?

12 A. No, I was not.

13 Q. And how about in 2002, '3, '4, '5, '6? Were you
14 working on developing the Personal Audio products?

15 A. No.

16 Q. Were you instead working on a business called --

17 THE COURT: Can you excuse me for just one
18 minute? Hold on.

19 All right. Go ahead, counsel.

20 MR. MORTON: Thank you, your Honor.

21 BY MR. MORTON:

22 Q. So, I think I was just going to ask you about the
23 Gotuit business starting in 2001. 2001 going forward,
24 what was -- well, what was your role at Gotuit?

25 A. I was CEO of Gotuit Media for its first few years.

1 Q. And what product lines were you focused on?

2 A. Well, we ^ had initially had done that SongCatcher
3 product and then we shut that down and switched over to
4 try and bring out products in the video space after we
5 got the Motorola investment.

6 Q. Can you just describe the product that you were
7 working on trying to bring to market for Gotuit?

8 A. Okay. So, I think it was in the, I guess, 2001 to
9 2003 I was involved in the video efforts. We were
10 working with set-top box companies as well as cable
11 companies to deliver an ability for consumers to
12 basically surf through Video on Demand content. So, some
13 of the cable companies were putting, say, new shows up on
14 their video-on-demand servers. So, you might come home
15 at night and want to watch the news and we had a service
16 that would tag the news stories so that you would know
17 what the beginning and end was and the software that we
18 would download to the set-top box and have on the server
19 could let the user just hit the "next" button and skip
20 from story to story.

21 Q. And how far along did that product get as far as
22 bringing it to market?

23 A. We had a pretty well-polished version that went
24 into trials at a few different cable companies and
25 several hundreds of thousands of people were using that

1 for a period of time.

2 Q. And how long did you work on that product?

3 A. Probably, you know, through 2003.

4 Q. And what did you do after -- what product line
5 were you working on -- strike that. Let me start over.

6 A. Okay.

7 Q. How long did you stay at Gotuit?

8 A. Through 2004.

9 Q. And what did you do after that?

10 A. I moved into the incubator in New Hampshire and
11 started Emergent Technologies and worked on a few
12 start-up ideas and projects, ultimately ending up in the
13 Bringrr Systems endeavor I'm involved in now.

14 Q. When you were working at Gotuit, did you consider
15 yourself to be in competition with Apple, Inc.?

16 A. We never did, no.

17 Q. I apologize, Mr. Logan. I'm just going through my
18 notes trying to figure out how much we still have to
19 cover based on the direct.

20 A. Sure.

21 Q. Are you aware, Mr. Logan, if Pause Technology was
22 ever subpoenaed for documents in this case?

23 A. Well, Pause Technology doesn't exist anymore. I
24 don't believe there is any attempt to get any documents,
25 wherever they might be, from that entity or from the

1 remains of that entity.

2 Q. Are you aware of whether or not Motorola was
3 subpoenaed for documents in this case?

4 A. I am not aware that they were.

5 Q. Can you turn to your deposition, sir?

6 A. Yes.

7 Q. Do you recall testifying about the Motorola
8 license in your deposition?

9 A. I don't recall the specifics, no.

10 Q. Can you turn to page 288?

11 A. Okay.

12 Q. And do you see there at line 23 -- well, we'll
13 start at line 18.

14 A. Okay.

15 Q. This is your answer. You're saying, "Certainly
16 that's the mode of operation with the Pause patent. Back
17 before the rules of the patent game changed, you were
18 able, as a small company, to go around the larger
19 companies and have conversations with them. And, in
20 fact, that's the sort of conversation we had with
21 Motorola that worked out quite nicely, you know, in
22 roughly the same time frame."

23 Do you see that, sir?

24 A. I do.

25 Q. Does that refresh your recollection about

1 testifying about Motorola in your deposition?

2 A. Yes.

3 Q. And can you turn ahead to page 293?

4 A. Okay.

5 Q. Do you see there starting at line 5 that you were
6 asked about your lawsuit against TiVo?

7 A. Yes, I do.

8 Q. And do you see your answer starting at line 6?

9 A. I do.

10 Q. "Well, first my negotiations with Motorola -- so I
11 had come across other players in that market" -- do you
12 see that?

13 A. Yes, I do.

14 Q. And then if we could turn to page 295.

15 MS. HUNSAKER: Your Honor, I'm going to object
16 to impeaching Personal Audio's own witness. It's
17 improper for him to be reading from Mr. Logan's
18 deposition.

19 THE COURT: Well, it's before the court; and
20 if the question is did he -- you're trying to point out
21 that there were some discussions in the deposition about
22 Motorola?

23 MR. MORTON: I'm actually trying to point out
24 that there were extensive discussions about Motorola, and
25 my next one I was going to go to would be the license.

1 THE COURT: Which is where?

2 MR. MORTON: Page 296 of the deposition,
3 starting at line 15.

4 THE COURT: Okay. This doesn't sound exactly
5 like what was testified to on -- during the trial. I
6 mean, looking at page 296, we're talking about Motorola
7 buying a 20 percent interest in the Pause company and
8 investing money in Gotuit. I certainly don't see
9 anything about a license or a 15-cent running royalty or
10 anything like that.

11 MR. SCHUTZ: Well, your Honor, Mr. Cordell
12 said it was a surprise during my redirect that there had
13 been any dealings with Motorola. Motorola is mentioned
14 during the transcript of Mr. Logan's deposition probably
15 20 different times.

16 THE COURT: I guess the surprise -- and it's
17 actually the surprise I'm having now -- is, I mean, you
18 read what he says on 296. (Reading) it was a combination
19 deal where Motorola put \$6 million into the Pause company
20 in exchange for 20 percent ownership and they also
21 invested \$4 million in Gotuit and are common
22 shareholders. Good deal because they would have the
23 option later to use the technology.

24 And then all of a sudden during the trial we
25 have him popping out with \$6 million plus 15 cents

1 running royalty.

2 MR. SCHUTZ: Your Honor, it was their
3 deposition. They never --

4 THE COURT: I know it was their deposition,
5 and it was his answer. He says one thing in deposition,
6 a stock purchase; and then all of a sudden at trial when
7 he's trying to make the point about running royalties, he
8 suddenly comes up with 15 cents running royalty which he
9 didn't hint at when he talked about it the first time.

10 MR. SCHUTZ: I think the point, your Honor, is
11 they made an allegation that the fact of a license
12 agreement between Motorola and Pause was something they
13 did not know about. This clearly -- they elicited
14 information about an agreement between Motorola and
15 Pause, never asked for a copy of it, never started asking
16 about any of the specific terms of it. After he's then
17 attacked at trial repeatedly, only in redirect did this
18 come up.

19 I just think it's unfair for them to toss
20 these allegations out that they knew nothing about a deal
21 between Motorola and Pause Technology.

22 THE COURT: Well, I'm not so worried about
23 knowing nothing about Motorola or evidentiary prejudice.
24 I'm now going into the...

25 Well, as I said, that may come up later.

1 We're going into the *laches* issue right now.

2 MR. MORTON: May I continue, your Honor?

3 THE COURT: Yes.

4 BY MR. MORTON:

5 Q. Mr. Logan, are you aware that the trust as well as
6 the trustee of the Logan Family Trust were subpoenaed in
7 this case?

8 A. I -- are you asking me if the trustee was
9 subpoenaed?

10 Q. Yes, sir.

11 A. I -- I don't know actually. I don't think that my
12 brother, who is the trustee, was deposed. So, I -- is
13 that the same thing as being subpoenaed?

14 Q. Well, the subpoena is one thing and the actual
15 deposition is another and that was going to be my next
16 question. Are you aware if the trustee was ever deposed?

17 A. I don't think he was deposed. I know Apple called
18 some people up and talked to them and then didn't take
19 depositions. So, I don't know if Apple or its lawyers
20 had talked to my brother and then he was never deposed;
21 but I don't think he went through the deposition process.

22 Q. And you produced a number of documents in this
23 case from back in 1996 in the Personal Audio days, right?

24 A. Yes, I did.

25 Q. And where were those documents kept?

1 A. I had this filing cabinet which I have toted
2 around with me for, you know, 16 years; and they were in
3 the third drawer.

4 Q. And you produced all of those documents that you
5 had about Personal Audio from 1996; is that right?

6 A. Yes, I did. Yes.

7 MR. MORTON: Give me one moment, your Honor.

8 I have no further questions, your Honor.

9 Thank you, Mr. Logan.

10 Pass the witness.

11 MS. HUNSAKER: No further questions, your
12 Honor.

13 THE COURT: Okay. You may step down.

14 Next?

15 MR. CORDELL: Your Honor, we now have some
16 citations to the trial record that we believe are
17 relevant to *laches*. Mr. Elacqua will present those.

18 THE COURT: Let me hold up -- or if you'll
19 hold up for just a minute, let me look at...

20 Was there an exhibit somewhere or did somebody
21 have a demonstrative that went through the chain of
22 assignments of the patent and the patent application?

23 I've got the patent assignment abstract of title, but I'm
24 remembering another -- did either side have some kind of
25 document where he went through that -- went through Logan

1 trust, went back to Personal Audio, or how that went?

2 MR. SCHUTZ: There were some -- there was an
3 issue related to SongCatcher and Gotuit, as to whether --
4 I can't remember if -- it's the '178 patent, I think.
5 And it was somehow assigned to Gotuit. And we went back
6 to the original assignment from the Logan trust to
7 Personal Audio -- or no. We went and looked at the
8 assignment from the Logan trust to Gotuit, and it did not
9 include any of the patents-in-suit.

10 THE COURT: That's Defendant's Exhibit 270.
11 I've got that.

12 MR. SCHUTZ: Okay.

13 THE COURT: So, there was not a --

14 MR. MORTON: Your Honor, because ownership was
15 stipulated to, we did not go forward and put, I don't
16 think, the entire chain of title. We, of course, have
17 it.

18 THE COURT: I mean, I'm sure counsel agrees
19 that it's somewhat important. Well, first of all, the
20 cases hold quite clearly that you can't have *laches*
21 beginning before the patent issues. And in this case it
22 looks like the patent issued and then shortly after iPod
23 comes out, or *vice versa*. But the cases also say that
24 there is, in effect, a hooking. *Laches* counts -- it
25 doesn't matter who owned it; *laches* is progressive. And

1 the defense seems to be that, well, Personal Audio has
2 only had this a short time; the trust had it earlier than
3 that.

4 My understanding of the cases is that -- of
5 the case law is that the *laches* hooks on and gets longer
6 and longer. So, I was interested in -- I was still
7 interested in who owned what when, since I've heard
8 testimony from Mr. Logan as to what he remembers and
9 evidently Mr. Call didn't remember very much.

10 MR. MORTON: Your Honor, a couple of points on
11 that.

12 THE COURT: Uh-huh.

13 MR. MORTON: I mean, I think it's been pretty
14 un rebutted testimony about who owned the patents in the
15 relevant time period and that it was the trust. We're
16 happy to submit additional documents on the ownership
17 chain, although that was also stipulated that we have it
18 correct.

19 The thing that I would say --

20 THE COURT: Is it in the stipulation as to
21 what the chain was or when it came over?

22 MR. CORDELL: No, your Honor. It's not. So,
23 I mean --

24 THE COURT: See, as I said before, the case
25 law I have -- unless somebody has something different --

1 says that it really doesn't matter. If the previous
2 person didn't file, then their *laches* hooks onto your
3 *laches* --

4 MR. CORDELL: Correct.

5 THE COURT: -- and so on. But just as a
6 matter of getting it straight, the patent assignment
7 abstract of title seems to indicate that the trust did,
8 in fact, have this from the period of 2001 up until about
9 2009. Is that about right?

10 MR. MORTON: That is correct.

11 THE COURT: Do you have anything to --
12 anything different than that?

13 MR. CORDELL: Other than those spurious
14 assignments in there, your Honor, I believe that if we
15 dig down into it, that's what the facts will show that
16 the trust --

17 THE COURT: Okay. All right. Okay. So, you
18 then had some references to the trial?

19 MR. MORTON: I have one other point --

20 THE COURT: Okay. Go ahead.

21 MR. MORTON: -- if I could.

22 When your Honor was talking about the hooking
23 effect on *laches* -- and I'm sure the court is correct
24 about that. The issue that I think that this pertains
25 to, though, is that what they would have to have shown is

1 that the trust knew or should have known, whoever the
2 patent holder was at the time knew or should have known
3 in order to have any *laches* arise that could then be, you
4 know, hooked into a successor entity.

5 MR. CORDELL: The evidence, your Honor, is
6 that Mr. Logan was active in the trust; so, I think the
7 evidence --

8 THE COURT: I think I understand that part.

9 MR. CORDELL: Thank you.

10 THE COURT: Okay. You had some references to
11 the transcript?

12 MR. ARENZ: Your Honor, we would object to
13 this. We exchanged exhibits last night; and they said,
14 "We're going to put in some deposition testimony of
15 Mr. Novacek." And this morning they came in after
16 9:00 p.m. [*sic*]; and they said, "Well, he's not --
17 unavailable under the Rule." So, we object. And now we
18 don't -- I don't think they've told us about this
19 testimony before.

20 MR. ELACQUA: Your Honor --

21 THE COURT: Well -- wait.

22 Keep in mind I've been here throughout the
23 entire trial, and I'm assumed to have heard it all. I
24 know sometimes people think judges just sit up here and
25 go to sleep, but I really do listen. And, so, I don't

1 think it's improper for an attorney to remind me, "Do you
2 remember on page so-and-so" or "refer back to page
3 such-and-such." I can't see that as being really unfair
4 because technically I'm supposed to have that instantly
5 at my fingertips. And I'm sure Ms. Mullendore has it
6 memorized.

7 MR. ARENZ: I understand, your Honor.

8 THE COURT: So, I'd know it anyway.

9 But, Mr. Elacqua, if you would help me out.

10 MR. ELACQUA: Yes, your Honor. And I, you
11 know, apologize to counsel for the delay. We were here
12 late with the charge conference; so, I'm not -- this
13 isn't an exhibit, your Honor. This is something we'll
14 file, and it's all very specific citations to the trial
15 record over the last week. There is additionally a
16 couple -- one citation from the deposition of Mr. Novacek
17 who testified in behalf of himself and as a 30(b)(6) of
18 ENCO systems and there is also a couple very specific
19 citations to Mr. Goessling's deposition as well and I
20 have those in a binder with the highlighted pieces of the
21 transcripts as well as a brief summary of what each
22 states.

23 THE COURT: Oh, okay.

24 MR. ELACQUA: We want to put that into the
25 record, and we'll file that as well.

1 THE COURT: And I presume you've presented
2 counsel with a copy?

3 MR. ELACQUA: Yes, your Honor.

4 THE COURT: Okay. Why don't you step up --

5 MR. MORTON: Not yet, your Honor. We haven't
6 seen this yet.

7 MR. ELACQUA: Counsel's been here the whole
8 trial. It is citations from the trial. If they want to
9 supplement --

10 THE COURT: Okay. Am I going to get a copy?

11 MR. ELACQUA: Yes, your Honor. Right here
12 (indicating).

13 MR. ARENZ: Your Honor, if I'm correct, some
14 of this is deposition testimony which we do object to
15 because Mr. Novacek isn't unavailable.

16 Moreover, if I may, his trial testimony wasn't
17 about *laches*; and we weren't going to cross-examine him
18 about *laches* in front of the jury. In fact, that's what
19 your motion *in limine* ruling suggested. So, we think
20 it's improper to offer his testimony now when we would
21 otherwise be able to cross-examine him on the relevant
22 issue today. That's what we thought the bench trial was
23 about.

24 THE COURT: Well, is he around or here or --

25 MR. ELACQUA: He's not, your Honor. He had a

1 prior engagement. And, your Honor, if I can respond to
2 that, first, *laches* was not in the jury trial; so,
3 counsel would not have been asking Mr. Novacek questions
4 about *laches*.

5 There is one citation and it's on Exhibit 2
6 and that's the sole citation we're offering from his
7 deposition that counsel took.

8 THE COURT: Okay. We have Jury Note Number 3;
9 and it says, "We would like to see the demonstratives
10 concerning patent '178."

11 And I thought...

12 Well, I think both sides have put in some of
13 those in terms of the group that Dr. Almeroth had. Can't
14 really tell whether they're looking at invalidity or
15 infringement. And I think some of Dr. Wicker's talk
16 about it also.

17 I think the only response I can give them is
18 "You have all of the exhibits that were properly admitted
19 in evidence. You'll have to rely on them subject to the
20 limitations that were given in the instructions."

21 I don't see any other answer that can be given
22 to that kind of a question.

23 MR. SCHUTZ: It's not exactly clear what it is
24 they're asking for, and I think we've agreed what goes
25 back and what doesn't go back. So, I'm not sure how we

1 send anything back to them.

2 THE COURT: Do you see any other way I can
3 answer that?

4 MR. CORDELL: I don't, your Honor.

5 THE COURT: Okay.

6 MR. SCHUTZ: Your Honor, I have one additional
7 piece of information.

8 THE COURT: About?

9 MR. SCHUTZ: When they were asking for the
10 demonstrative relating to the '178, the other
11 demonstratives relating to the '076 patent are 771A and
12 then they click up to 781A. The last three of those
13 actually relate to the '178 patent. They may not have
14 seen that in the fine print; so, they may actually have
15 demonstratives back there so --

16 THE COURT: I think they do.

17 MR. SCHUTZ: Yeah.

18 THE COURT: That's the point.

19 MR. SCHUTZ: Okay.

20 THE COURT: But --

21 MR. SCHUTZ: I mean, you might want to point
22 them to those particular exhibits. I think it's 778 --

23 MR. CORDELL: But then, your Honor, we get
24 into pointing them to ours.

25 THE COURT: No. What I may say is "These

1 include" -- or "You have all of the exhibits and all of
2 the demonstrative summaries relating to the '178 patent
3 that were admitted. You need to rely on these."

4 MR. CORDELL: I think that's fine, your Honor.

5 THE COURT: Did you include them in your index
6 at the bottom?

7 DEPUTY CLERK: Yes, sir.

8 (Discussion off the record)

9 THE COURT: If counsel would step forward and
10 read the note to be sure there are no objections.

11 MR. SCHUTZ: I guess, your Honor, the only --
12 I would object to your inviting them to look at the DAD
13 system without them asking. I think merely pointing out
14 that you have all of them except DX 87 -- so, I would
15 request that the last sentence that says, "If you want to
16 examine the DAD system, please let the court officer
17 know."

18 THE COURT: The problem is that I don't know
19 what they were asking for or not asking for precisely,
20 and I don't want to leave the impression that they can't
21 have it. For example, there's also this Sony Discman
22 that for some reason was used in closing and didn't go
23 down to them. All of the other little physical objects
24 are there; and I don't want to leave the implication by
25 saying that you have them all except this one, because

1 technically -- and it wouldn't be true to say they have
2 them all. They don't have the DAD down there.

3 MR. SCHUTZ: Right. And you do say that, but
4 you're almost inviting them to come look at it; and, so,
5 I'm concerned about the court's imprimatur on the DAD
6 system.

7 THE COURT: But the problem is if I don't have
8 that sentence in there, the implication to them is they
9 can't have that for some reason. "You have them all
10 except this one" -- I was trying to think of a way of
11 writing it without -- I did not want to invite them to do
12 it, either, because it causes endless problems; but I
13 don't want them to think that they couldn't look at it if
14 they didn't *[sic]* want to.

15 MR. SCHUTZ: Again, I'm concerned that the
16 court is inviting --

17 THE COURT: What about this: "Except for the
18 DAD system which is still in the court"?

19 MR. SCHUTZ: I would agree to that.

20 MR. CORDELL: "Except for the DAD system which
21 is available for review in the court"?

22 MR. SCHUTZ: Again, I think that's inviting --

23 THE COURT: No. I could say "which is still
24 in the court." If somebody really wants it, they can
25 ask. They can ask for it.

1 The logistical problems of having them come
2 down and look at this thing, given the amount of
3 information they're likely to get out of it, is
4 difficult. I mean, I'm not at all interested in having
5 Mr. -- is it Novacek? -- demonstrate that thing to them
6 without a gag on because he's a witness.

7 MR. STEPHENS: He's a talker, your Honor.

8 MR. SCHUTZ: And we would obviously object to
9 anybody demonstrating it. That's testimony again, and
10 testimony is closed.

11 THE COURT: Well, there is a problem with
12 that. I mean, there are all kinds of problems with it;
13 so, I don't want an invitation -- let's just change it to
14 "which is still in the court."

15 DEPUTY CLERK: And take out the last sentence?

16 THE COURT: Yes. And I am going to have --
17 since I didn't realize this hadn't gone down there, I'm
18 going to have Ms. Laurents give this to them and just
19 explain that it got pulled out.

20 MR. SCHUTZ: We have no objection to that.

21 THE COURT: And what I'm talking about when I
22 say "that," DX 32.

23 DEPUTY CLERK: I'm going to let you read it
24 again with the removal and addition.

25 MR. SCHUTZ: I think this works, your Honor.

1 No objection to this.

2 MR. CORDELL: Could we just add two words,
3 your Honor? "You have all of the exhibits in the jury
4 room" -- or maybe it should be at the very end. So,
5 "Except for the actual DAD system, DX 87, which is still
6 in the court, you have all of the exhibits and all of the
7 demonstrative summaries that relate to the '178 patent
8 that were admitted, in the jury room."

9 THE COURT: That would work.

10 MR. SCHUTZ: It's innocuous. I don't care.

11 THE COURT: Okay. Put that in.

12 (Discussion off the record)

13 THE COURT: Okay. So, defendant is now
14 through with its presentation?

15 MR. CORDELL: Yes, your Honor. Defendant
16 rests on the equitable issues.

17 THE COURT: Okay. Personal Audio?

18 MR. MORTON: Yes, your Honor. A couple of
19 things. I would like to offer Plaintiff's Exhibits 226,
20 227, 228, and 229. These are on the admissible list
21 agreed to; and that is the chain of title, your Honor.

22 THE COURT: Okay. Do you have copies of those
23 or...

24 MR. MORTON: I can give you my copy --

25 THE COURT: Seeing as the deputy clerk just

1 stepped out with that note. If you want me to actually
2 look at them and read them.

3 MR. MORTON: I'm happy to hand up my copies I
4 have here.

5 THE COURT: Okay. And for record purposes, I
6 do read all of the exhibits; so, we don't want an
7 inference that I don't.

8 MR. MORTON: I apologize, your Honor. They
9 didn't get on our exhibit list in order, but it's pretty
10 clear what they are and the transfer that occurs.

11 THE COURT: All right. Why don't we make this
12 easy for me. Which one are we dealing with here?

13 All right. So, Plaintiff's Exhibit 226 would
14 show that James Logan gave Personal Audio a dollar for --
15 no. Personal Audio gave James Logan a dollar for the
16 '813 application?

17 MR. ARENZ: That's 226, yes.

18 THE COURT: Okay. All right. And that's
19 in --

20 MR. ARENZ: That's in 1998, sir.

21 THE COURT: Okay. The 27th of May, 1998. All
22 right.

23 MR. ARENZ: I don't have the exhibits in front
24 of me. I think 228 is the original assignment from the
25 inventors to Personal Audio, Inc.

1 THE COURT: All right, in '96. Okay.

2 MR. ARENZ: And then you have two more
3 assignments; and I know the last one goes from the trust
4 to Personal Audio, LLC. That brings us to today.

5 THE COURT: All right.

6 MR. ARENZ: So, I believe 227 is -- I'm
7 presuming -- Mr. Logan to the trust; and that's also in
8 1998.

9 THE COURT: Okay. What else?

10 MR. ARENZ: Well, just a couple of brief
11 things, your Honor. On the topic of 30(b)(6) notices, we
12 had a motion *in limine*, Number 3, that we sought to have
13 Apple estopped from raising any issue over evidentiary
14 prejudice or economic prejudice because we noticed
15 depositions of Apple back last fall and they refused to
16 produce a witness on the topics we noticed.

17 And I have a copy of the notice if you would
18 like, if I can approach, your Honor.

19 THE COURT: No. I've got the motions *in*
20 *limine* you filed. It should be attached in there.

21 MR. ARENZ: And, so, your ruling just mentions
22 to raise objections at the bench trial; and I'd like to
23 do that. I don't know yet what is in the trial
24 transcripts; but to the extent it goes to either economic
25 or evidentiary prejudice, we would, of course, object to

1 that coming in or any other argument by Apple on those
2 two points.

3 THE COURT: Okay. Let me understand. You
4 want to -- I'm taking a look at the response, and I don't
5 know if you have that in front of you.

6 MR. ARENZ: I do not, your Honor.

7 THE COURT: Well, maybe you'll want to obtain
8 a copy. Might not be a bad idea to have what you filed
9 as your original motion *in limine* since I think that's
10 what you're going on.

11 MR. ARENZ: While we're trying to find that,
12 your Honor, the point I also wanted to make was we would
13 like to make the objection regardless of the substance of
14 the motion -- we would like to make it currently as well.

15 THE COURT: Because?

16 MR. ARENZ: Well, for the same reasons that
17 there was -- there was a notice, there was a deposition
18 notice, and we wanted to --

19 THE COURT: Well, counsel, the reason I think
20 it might be worthwhile for you to look at your own motion
21 and look at the response is I'm looking at the response
22 and one of the things that Apple provided me with was
23 deposition testimony from a witness going on about their
24 research and development and workaround and so forth
25 and -- so, at least there was something that was provided

1 by deposition. That's -- if you'll have it in front of
2 you, we can then discuss what it is you think is missing.

3 MR. ARENZ: I don't have the motion, but I do
4 think I have an idea of what you're talking about.

5 THE COURT: Okay.

6 MR. ARENZ: In terms of Topic Number 3 on
7 economic prejudice, which is just one of the many topics
8 they didn't produce a witness on, they said to the extent
9 it encompasses topics in yet a different 30(b)(6), which
10 was a financial representative who was not going to
11 address things like how Apple's economic position changed
12 as a result of the delay. And I think what the case law
13 gets at is you really need to show, for economic
14 prejudice, some sort of change and not just what sort of
15 expenses you had; but you have to show that those
16 expenses would have been different if the lawsuit was
17 filed earlier.

18 And we don't have -- we didn't get a witness
19 on that topic. And there was no witness at all on
20 evidentiary prejudice.

21 THE COURT: Who is Charles Lancaster?

22 MR. ARENZ: He's an Apple employee. And we do
23 have a brief clip of his deposition to the extent they
24 are allowed to offer economic prejudice. We think his
25 testimony wasn't sufficient to raise it, but we thought

1 we --

2 THE COURT: Well, okay. You're talking two
3 different things. One, you're saying I should rule that
4 they get in nothing because they didn't respond to a
5 30(b)(6). And then before you even argue that, you say,
6 "Oh, well, this clip from Lancaster isn't enough; so,
7 they should lose on the merits."

8 Now, which way are we going?

9 MR. ARENZ: Well, I'll tell you, your Honor.
10 The position is we didn't get a full deposition on this
11 topic; so, they shouldn't -- it should be conclusively
12 established that they were not economically prejudiced.

13 To the extent that is denied, that motion and
14 that objection is denied, then we would offer the
15 deposition --

16 THE COURT: What do you mean you didn't get a
17 full deposition? I've read through the first few pages.
18 You asked this Mr. Lancaster these questions. He gives
19 his answers. Now, you may be correct that his -- in the
20 end there's not much there; but that's different than
21 saying kick them out entirely. I mean, he just may not
22 know a lot. That doesn't mean -- if that's the best
23 they've got, that's the best they've got. I'm not going
24 to let in other witnesses on the change in financial
25 position, the evidentiary -- I mean, the economic

1 prejudice.

2 MR. ARENZ: So, here's the deal, judge. I
3 think we're fine putting in the video, but my point is --

4 THE COURT: Whose video?

5 MR. ARENZ: Mr. Lancaster's -- or a clip.

6 THE COURT: You're going to introduce the
7 video?

8 MR. ARENZ: To the extent that my motion is
9 denied or my objection is overruled, we would, yes.

10 THE COURT: Why on earth would you present
11 their evidence for them?

12 MR. ARENZ: No. It was our deposition, and we
13 think it shows they weren't prejudiced. And my point --

14 THE COURT: Oh, okay.

15 MR. ARENZ: -- is we took a 30(b)(6) -- we had
16 a notice, and it was on a broad scope, on the full scope
17 of economic prejudice.

18 THE COURT: Well, I'll tell you what. It
19 seems fair -- and I'll let Mr. Elacqua address this --
20 that I limit their testimony on this issue to the
21 testimony that was given by the 30(b)(6) witness; but I
22 don't see how it's fair that I keep out the testimony
23 that he gave if he gave testimony under 30(b)(6). I
24 mean, I --

25 MR. ARENZ: Your Honor, my point is there was

1 a broad topic; and they said, "We're not going to give
2 you a witness on this broad topic. To the extent that it
3 overlaps with something else, we'll give a witness on
4 that." And, so, it's not a full-scope deposition. It's
5 not what we asked for. I mean, and we were entitled to
6 it.

7 THE COURT: But this is something they have
8 the burden of proof on.

9 MR. ARENZ: That's exactly my point, judge.

10 THE COURT: And, so, they get limited to what
11 they provide; and evidently you think you win on the
12 merits there. So, why the -- where is the sanction?

13 MR. ARENZ: My point is we weren't able to
14 cross-examine them fully on this and they have the burden
15 of proof and, so, to the extent that we can't get full
16 cross-examination, we've been prejudiced ourselves. And
17 that's why it should just be resolved that there was no
18 economic prejudice in this case without further --

19 THE COURT: I may be missing some subtle
20 point, but I don't see it is explained very clearly. I'm
21 going to deny the request -- of course, they haven't even
22 offered this; so, I'm not sure why you're trying to keep
23 it out. But if you're going to -- you've now presented
24 it to me or reminded me of it. I'll go ahead and read
25 it. I haven't heard them even try to get in other

1 economic prejudice evidence, unless it's in those --
2 there wasn't any in the trial.

3 MR. ARENZ: Okay, judge. I think my
4 colleague, Mr. Schutz, has me on the right line here. We
5 think Mr. Lancaster -- we'll put in the clip report of
6 his deposition, and that will be limited to economic
7 prejudice.

8 THE COURT: Okay.

9 MR. ARENZ: For evidentiary prejudice,
10 however, Apple refused to designate a witness; and our
11 objection continues to stand with that respect.

12 THE COURT: All right. And, Mr. Elacqua, I
13 think you were the one -- yes. It was your declaration
14 that brought this in. Let me first find the notice
15 again.

16 All right. Mr. Arenz, where -- okay. So
17 you're looking at your Topic 4, right, "all evidentiary
18 prejudice suffered," right?

19 MR. ARENZ: That's correct, your Honor.

20 THE COURT: Okay. And then --

21 MR. ELACQUA: Your Honor, I think I can maybe
22 short-circuit the evidentiary prejudice issue.

23 THE COURT: All right.

24 MR. ELACQUA: Just to save your Honor some
25 time.

1 As your Honor knows, we're primarily relying
2 on two factors relating to *laches*, Number 1, the
3 presumption and, Number 2, the evidentiary prejudice
4 relating to Mr. Logan, Mr. Call, and other related
5 testimony at trial. We didn't designate a witness on
6 evidentiary prejudice, your Honor. We obviously couldn't
7 designate, you know, Mr. Logan, Mr. Call, and other
8 evidentiary prejudice relating to plaintiff. So, I
9 believe, your Honor, the issue is moot.

10 THE COURT: All right.

11 MR. ELACQUA: I don't think they're trying to
12 exclude --

13 THE COURT: Why -- let me ask Mr. Arenz. If
14 what their trial tactic is is to use their lawyer as part
15 of his trial strategy to cross-examine your corporate
16 representative plus Mr. Call about their failings, why
17 would they have to disclose a corporate witness of any
18 kind to say, "Yep, I've talked with the attorney and he
19 plans on doing a killer cross-examination of two of your
20 guys"?

21 MR. ARENZ: We don't have an objection to
22 allegations of evidentiary prejudice with respect to
23 Personal Audio.

24 To the extent it's within Apple or --

25 THE COURT: Okay. But he hasn't tried to

1 present any of that yet, has he?

2 MR. ARENZ: It was in the proposed findings of
3 fact; so, that's where --

4 THE COURT: Well, we're doing the bench trial
5 now; and they've already rested.

6 MR. ELACQUA: That was why I was trying to
7 short-circuit the issue, your Honor, so -- we've rested.

8 THE COURT: All right. They've rested.
9 They're not bringing it in. I don't think you need to
10 object --

11 Unless you want me to look at it.

12 MR. ARENZ: No, sir.

13 THE COURT: -- to what they haven't --

14 MR. ARENZ: The last point and then I think we
15 can conclude. I do have a couple of deposition clip
16 reports. One is from our patent law expert Judge Andrew
17 Dillon.

18 THE COURT: Clip report, which is...

19 MR. ARENZ: We have a couple of options.
20 We're going to offer some deposition testimony.

21 THE COURT: Okay.

22 MR. ARENZ: We could play it if your Honor was
23 interested. We also have the excerpts, which we call a
24 "clip report," so you don't have to --

25 THE COURT: You're talking about a deposition

1 excerpt?

2 MR. ARENZ: That's correct, sir.

3 THE COURT: I'm sorry. I'm not on the latest
4 terms, sir.

5 MR. ARENZ: And then we have a DVD. So, if
6 you wanted to bring it home tonight and watch the
7 deposition yourself, you could do it that way.

8 THE COURT: My family might enjoy this.

9 MR. CORDELL: Thursday is patent law expert
10 night, your Honor.

11 MR. ARENZ: So, if I may approach --

12 (Discussion off the record)

13 THE COURT: Okay. All right. So, you've got
14 some -- I can probably read faster than I can watch; so,
15 why don't you give me the excerpts, of course making sure
16 that Mr. Elacqua or somebody has -- on their side knows
17 which ones you're giving me.

18 MR. ARENZ: Yeah. They have
19 counter-designated as well. May I approach, your Honor?

20 THE COURT: Please do.

21 MR. ARENZ: Okay.

22 THE COURT: Okay. We have Jury Note Number 4,
23 "We are requesting to leave at 5:00 p.m. to return
24 tomorrow morning."

25 So, regardless of all the bad publicity the

1 Eastern District always gets about patent trials, once
2 again one of our juries is willing to work as hard as it
3 takes to get through it. And I intend to call them in so
4 I can give them the typical instructions before they
5 leave, and I will ask them when they want to come back.
6 Sometimes they'll ask to come back at 9:00 instead of
7 8:30.

8 Any objection to that procedure from Personal
9 Audio?

10 MR. SCHUTZ: None, your Honor.

11 THE COURT: From Apple?

12 MR. CORDELL: No, your Honor.

13 THE COURT: Okay. Then if you would please --
14 just for the record, I'm addressing the court security
15 officer. If you would please inform them that if they
16 want to leave at 5:00, I'd like for them to come down
17 here at about five minutes of. I need to give them a few
18 instructions before they leave.

19 COURT SECURITY OFFICER: Yes, sir.

20 THE COURT: Okay.

21 I'm reading through Mr. Dillon's testimony
22 here; and so far it -- and along with the PowerPoints or
23 slides he had -- all seemed to be dealing with the
24 equitable conduct issue about the alleged failure to
25 submit the DAD manual, right?

1 MR. ARENZ: That's correct, your Honor.

2 THE COURT: Dillon is not involved -- or
3 Mr. Dillon is not involved in the laches, right?

4 MR. ARENZ: That's correct.

5 THE COURT: Okay. Then I read it correctly.

6 All right. Anything else, then, from Personal
7 Audio?

8 MR. MORTON: Just a little bit of procedure,
9 your Honor. First, I know they handed up some trial
10 transcripts; and at least under the rule of completeness,
11 I'd like the opportunity to be able to look at those and
12 see what else should be cited.

13 THE COURT: All right. Well, since the jury
14 is coming back tomorrow morning and at least one attorney
15 on each side has to be here tomorrow morning to answer,
16 why don't you let me know in the morning if you want me
17 to consider additional references.

18 MR. MORTON: Certainly, your Honor.

19 THE COURT: Let me -- any other issues we need
20 to take up? There were just the two equitable ones for
21 the bench trial, right?

22 MR. MORTON: Yes. My only other question was
23 going to be if we do revised proposed findings of fact in
24 light of the actual record at this point or not.

25 THE COURT: Well, if you wanted to take a look

1 at the ones you've already provided and cross out the
2 ones you don't think are really needed or are involved
3 right now, that would be fine. That might help me some.
4 But to take the time of whole new ones, I don't think I
5 need that.

6 But if there is some really key point that is
7 going to come up in one of your -- the extracts you're
8 going to put -- or, for that matter, one of the ones you
9 presented and you wanted to just let me know about it --
10 no, I'm not asking you to rewrite a huge, long findings
11 of fact; but if you had an extra finding based on "Look
12 at whatever it is we presented" or whatever, then sure,
13 let me know.

14 MR. MORTON: Okay. And I just asked
15 especially because we -- it's actually their burden and
16 we put out our findings first and then they put theirs
17 out a couple weeks later; so, I was just looking for some
18 way to be able to --

19 THE COURT: Well -- did you have something you
20 wanted to add?

21 MR. CORDELL: No, your Honor.

22 THE COURT: All right. I guess the concern I
23 have here is the presumption of six years. And near as I
24 can tell, the patent was issued in 2001 and suit wasn't
25 filed until 2009. Am I right about that?

1 MR. CORDELL: Yes, your Honor.

2 THE COURT: Okay. During that entire time,
3 Mr. Logan has got his hand in there somewhere; and during
4 much of it, almost all of it, Mr. Call has his hand in
5 there somewhere and at the very least is attorney for the
6 trust. I'm gathering that you're saying that the burden
7 doesn't shift and you don't need to focus on going ahead
8 and bursting -- I mean, as I understand it, it's a
9 bursting-bubble-type presumption, not one of the very
10 rare "never switches" kind. Don't you feel that there
11 might be some burden to go ahead and attack the
12 evidentiary or economic prejudice prongs?

13 MR. MORTON: First, your Honor, I don't think
14 that a presumption arises because there is no evidence
15 that the trust knew or should have known.

16 And I don't think there is -- even if you were
17 trying to impute to their patent attorney or Mr. Logan
18 who had no contractual obligation, if you were trying to
19 impute their knowledge, there is no evidence that they
20 knew or should have known and specifically knew or should
21 have known that the iPod infringed. That's what the
22 cases say. So, it is not enough to simply say the patent
23 was out and the product was out. That's not the burden
24 that they have to show simply to get that initial bubble,
25 as you put it.

1 If they had that, then absolutely we would
2 burst the bubble with lack of prejudice, either economic
3 or evidentiary.

4 THE COURT: Okay. And your side is that the
5 passage of time, the involvement of Mr. Call and
6 Mr. Logan shifts -- or brings into play the presumption,
7 right?

8 MR. ELACQUA: Yes, your Honor. And we believe
9 that as a patent owner, Mr. Logan, who was obviously
10 involved the whole time, could not just lie in wait or
11 ignore the market. There is an obligation there; and
12 because of the six-year -- more than six years, the
13 presumption should stand.

14 THE COURT: What would be your strongest case
15 on the "he can't ignore the market, he can't be willfully
16 blind," anything along that line?

17 MR. ELACQUA: I can cite that to you, your
18 Honor. I believe it's in our proposed findings of law,
19 but let me pull that up right here.

20 The primary case, your Honor, is the *Aukerman*
21 case and --

22 THE COURT: I have that. I know the citation
23 to that.

24 MR. ELACQUA: Your Honor, for some reason I
25 don't have the proposed findings right in here; and I can

1 provide the court with citation in the morning.

2 THE COURT: I've got those.

3 Ready for the jury?

4 COURT SECURITY OFFICER: Yes, sir.

5 THE COURT: Please bring them in.

6 (The jury enters the courtroom, 4:56 p.m.)

7 THE COURT: All right. Mr. Dixon, I
8 understand that you are the foreperson.

9 THE FOREPERSON: Yes, sir.

10 THE COURT: Okay. And I understand the jury
11 wishes to break for the evening and come back tomorrow
12 morning.

13 THE FOREPERSON: That's correct.

14 THE COURT: At what time?

15 THE FOREPERSON: 8:30 will be fine.

16 THE COURT: Okay. Then, ladies and gentlemen,
17 I'm going to -- and you may be seated, sir.

18 I'm going to go ahead and excuse you for the
19 evening and ask you to be back at 8:30. Even though we
20 now have all of the evidence and you have, as I've told
21 you before, my instructions and the lawyers' arguments,
22 please remember all of the rules and the instructions
23 I've given you in the past about not doing outside
24 research, don't let anybody talk to you about this, don't
25 let anybody try to influence you, don't go do any

1 reading.

2 And most importantly, when you come back
3 tomorrow morning, wait until all of you are together
4 before you start to talk about it. It would not be fair,
5 proper, or anything else if five or six of you got
6 together, made up your minds, and then just told
7 everybody else, as they came in, what a decision on any
8 issue was going to be. Wait until you're all back
9 together before you start discussing the case.

10 And at this time, then, please -- any
11 exhibits, notes, whatever, leave them there in the jury
12 room. We'll lock them up. At this time you are excused,
13 and I'll see you tomorrow at 8:30.

14 Actually you don't have to come to the
15 courtroom. As soon as you all get there in the jury
16 room, you can start to deliberate.

17 (The jury exits the courtroom, 4:57 p.m.)

18 THE COURT: Anything else, Mr. Elacqua?

19 MR. ELACQUA: Your Honor, it is in the
20 proposed findings so --

21 THE COURT: All right. What is the case?

22 MR. ELACQUA: There are a couple, your Honor.
23 The first one obviously is *Aukerman*; and the second would
24 be *Wanlass versus General Electric*, 148 F.3d 1334 at
25 1338, which discusses the fact that there is a duty on

1 patentees to police their patent rights and, in the
2 absence of actual knowledge, impose constructive
3 knowledge.

4 In addition, *Hall versus Aqua Queen*, 93 F.3d
5 1548 at 1553, discusses the fact that a patentee must
6 investigate pervasive open and notorious activities that
7 a reasonable patentee would suspect were infringing; and
8 there are additional citations in that case as well.

9 THE COURT: All right.

10 And if Personal Audio has a case -- I mean,
11 that's -- what Mr. Elacqua said is basically the
12 long-standing law. There has always been some duty
13 there. Now, if there is something -- you made the
14 argument that someone would have to show that the trust
15 knew. I'm not sure I've had a case before involving a
16 trust or how they might be different than any other
17 entity that owned a patent or had an interest in a
18 patent. Maybe -- I mean, I can imagine courts might be
19 more charitable towards trusts, just in the nature of
20 things.

21 I mean, if you've got a case along that line,
22 let me know about it tomorrow; and I'll certainly
23 consider it. I just haven't seen one. I think the cases
24 that were just cited -- I mean, it's an equitable thing
25 and I've got to balance it all out, but if you've got one

1 strongly going the other way, please bring that to my
2 attention. Okay?

3 MR. MORTON: We will look into the trust
4 issue, your Honor. I think our first line of defense on
5 that is that there is just no evidence of what the trust
6 knew or should have known at all.

7 One case I will point the court to is -- it's
8 called *Bright Response*, at 730 F.Supp. 2d at 623; and the
9 issue that it goes to is whether or not even if you
10 looked, if you would know that it was infringement.
11 We've seen an awful lot about the source code in this
12 case and how you've got to have access to proprietary
13 information. That is one of the bases to rebut any idea
14 that you knew or you should have known of the
15 infringement.

16 THE COURT: Okay. All right. Anything else,
17 then, from Personal Audio's point of view that needs to
18 be taken up before we leave?

19 MR. SCHUTZ: No, your Honor.

20 THE COURT: From Apple?

21 MR. CORDELL: No, your Honor. Thank you.

22 THE COURT: In that case, we'll be in recess.
23 I don't need the whole team tomorrow, but I will need
24 someone with authority to help answer notes starting at
25 8:30.


MR. CORDELL: Thank you.

THE COURT: We're in recess.

(Proceedings adjourned, 5:01 p.m.)

COURT REPORTER'S CERTIFICATION

I HEREBY CERTIFY THAT ON THIS DATE, JULY 7,
2011, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
RECORD OF PROCEEDINGS.


CHRISTINA L. BICKHAM, CRR, RMR

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